Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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110 pp

QUESTION PRESENTED

The undisputed evidence below showed that at a time when the jury in this case was reporting itself deadlocked, the court officer in charge pulled out his gun, removed a bullet, held it out to a juror, and suggested that a dissenting juror should be "put out of her misery." The jury thereafter returned a verdict against petitioners for $5 billion in punitive damages. The court officer committed perjury to conceal his misconduct. When the officer's misconduct subsequently came to light, the district court refused a new trial; the Ninth Circuit affirmed on the ground that no *presumption* of jury prejudice from the misconduct applied, and that petitioners had failed to carry their resulting burden to *prove* prejudice from the misconduct.

On this record the following question is presented:

Whether this Court's decisions in *United States v. Mattox*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954), holding that improper ex parte contacts with the jury establish a rebuttable presumption of prejudice, remain good law, as the First, Second, Seventh, Tenth, and Eleventh Circuits have held, or whether intervening decisions of this Court have implicitly overruled those decisions, as the Sixth Circuit has held, or cut back on them, as the Third, Fourth, Fifth, Eighth, and Ninth Circuits have held.

PARTIES AND CORPORATE DISCLOSURE

Petitioners are Exxon Mobil Corporation (formerly Exxon Corporation) and Exxon Shipping Company, defendants below. Exxon Shipping Company is a wholly-owned indirect subsidiary of Exxon Mobil Corporation. No publicly held company owns 10% or more of the stock of Exxon Mobil Corporation.

Respondents in this case were plaintiffs in the court below. They are Grant C. Baker, Alaska Sport Fishing Association, Louie E. Alber, Ahmet Arturner, Jeffrey Bailey, William Bennett, William Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, DEBRA LEE, Inc., Dew Drop, Inc., Larry L. Dooley, Mary Doumit, Steve Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompf, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghen, Elenore E. McMullen, Leslie R. Meredith, Native Village of Tatitlek, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A Tisdall, and Darrell Wood, individually and as representatives of a mandatory punitive damages class.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Exxon Mobil Corporation, *et al.* (collectively "ExxonMobil"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Sea Hawk Seafoods, Inc. , et al. v. Alyeska Pipeline Service Co., et al.*, 206 F.3d 900 (9th Cir. 2000).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is published at 206 F.3d 900, and is reprinted in the Appendix to this Petition ("App.") at 1a. The opinion of the United States District Court is unreported and is reprinted at App. 24a. An amended district court opinion, with technical corrections, is reprinted at App. 46a.

JURISDICTION

The decision of the Court of Appeals was filed March 16, 2000. On May 26, 2000, Justice O'Connor extended the time for filing this petition to July 14, 2000. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides in pertinent part,

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

The Fifth Amendment to the Constitution provides,

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case involves the fundamental right to a fair and impartial jury. In *United States v. Mattox*, 146 U.S. 140, 150 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954),

this Court held that any ex parte communication with the jury creates a risk that the jury will improperly decide the case on the basis of extrarecord influences. Proof of the existence of such outside contacts, these cases held, therefore creates a presumption that the jury was prejudiced, shifting the burden to the party defending the verdict to establish that the contacts did not, in fact, result in prejudice to the jury.

In this federal admiralty case, the Ninth Circuit refused to apply the *Mattox/Remmer* presumption, and instead imposed upon petitioners the burden of proving that prejudice had actually occurred – a burden that is for all practical purposes nearly impossible to carry, since Federal Rule of Evidence 606(b) renders inadmissible evidence of what factors actually influence a jury's verdict. The Ninth Circuit held that petitioners had the burden of proving actual prejudice despite an undisputed record that the Court Security Officer ("CSO") in charge of the jury in this important and highly publicized case, after repeated improprieties and at a time when the jury was at an impasse, took a bullet out of his gun, held it out to a juror, and suggested that a dissenting juror should be "put out of her misery" – thereby taking sides with the majority against the minority. Shortly thereafter, the jury awarded $5 billion in punitive damages against petitioners.

On these facts, the question presented is whether the "presumption of prejudice" rule established in *Mattox* and *Remmer* remains good law. Those cases have never been overruled. But the Sixth Circuit now holds that ex parte communications *never* create a presumption of prejudice, and that the party challenging the verdict thus always bears the burden of proving prejudice. The First, Second, Seventh, Tenth and Eleventh Circuits, by contrast, continue to follow *Mattox* and *Remmer*, and hold that a presumption of prejudice arises in all cases involving improper outside contacts with the jury. In the other circuits, confusion prevails: like the Ninth Circuit here, the Third, Fourth, Fifth, and Eighth Circuits hold that the presumption applies in *some* cases, but

not in others. And each of those circuits draws the line differently.

The controversy over the continued vitality of the *Mattox/Remmer* rule arises here in the context of a claim for punitive damages against a large corporation, a situation in which this Court has recognized the especially acute danger of jury prejudice. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) ("If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries."). For that reason it is especially important to ensure that the jury is fair and impartial in fact, not merely in appearance, and that fair and sound procedures are followed before punishment is inflicted. *Id.* at 431-32. The $5 billion verdict in this case was the product of anything *but* fair and sound procedures in respect to the critical, constitutionally-based requirement that the jury's deliberations must not be affected by any outside influences. Despite all that happened, and despite the rule enunciated in *Mattox* and *Remmer*, neither the district court nor the Court of Appeals was willing to presume that the deliberations, which produced a literally unprecedented verdict, had been adversely affected. This case perfectly illustrates the importance of the *Mattox/Remmer* rule and why the Court should clarify the confusion in the lower courts on this issue.

A. Factual Background

This case arises out of the litigation in Alaska following the grounding of the tanker EXXON VALDEZ in Prince William Sound on March 24, 1989, and the resulting oil spill. ExxonMobil stipulated to liability for compensatory damages, having previously spent over $300 million voluntarily to pay claims, as well as over $3 billion in clean up and restoration costs. The jury here passed on plaintiffs' claims for punitive damages, and on certain issues as to the *amount* of compensatory damages. Trial (before the Honorable H. Russel Holland) was in three phases in the summer of 1994, with

the jury deliberating after each phase, for a total of 41 days. In Phase I, the jury found that Captain Hazelwood, the Master of the vessel, had been reckless; having been instructed that Hazelwood's recklessness was to be imputed to ExxonMobil, the jury found ExxonMobil reckless as well. ER 63.[1] In Phase II, the jury awarded compensatory damages, which came to $ 19,590,257 after deductions for payments already received by plaintiffs. ER 65, 187. In Phase III, the jury awarded punitive damages of five billion dollars. ER 81.

While its appeal from the judgment on this verdict was pending, ExxonMobil discovered an extraordinary set of facts regarding the jury's deliberations. The facts reported below come from four different sources. First, there is the record of the 1994 trial. Second, on June 13 and 14, 1995, the district court took testimony from ten of the eleven jurors. Third, in the fall of 1995 the United States Marshals Service conducted an investigation into the misconduct of court security officer Donald Warrick. Fourth, in March 1998 the district court took testimony from the remaining juror, Rita Wilson.[2] We set out first the facts as they emerge from these various sources. Thereafter we describe the tortuous process by which the facts came to light.

1. *Intrusion Into the Jury's Deliberations*

The Court Security Officer ("CSO") primarily responsible for the jury during its deliberations was Donald Warrick. JTr. 261:14-23; ER 266-67. Warrick was hired in March 1994 by General Securities Service Corporation, a private

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[1] "ER" refers to the Joint Excerpts of Record below; "CD" refers to the Clerk's Docket; "JTr." refers to the transcript the jurors' questioing in June 1995; and "WTr." refers to transcript of Juror Wilson's questioning in March 1998. The trial transcript is cited as volume/page:line.

[2] The opinion below refers to Mrs. Wilson as "Juror A" and to Juror Doug Graham as "Juror B." The parties' briefs in this case were ordered unsealed, however, and the identities of these jurors and the facts involved in this case were printed in Alaska newspapers and are all a matter of public record.

company engaged by the United States Marshals Service to provide security at the federal court house in Anchorage. ER 225, 253. Warrick had no experience as a bailiff, and was given no training in how to behave with jurors. ER 323:19-324:11; ER 279-80, 303. He was nevertheless put in charge of the jury in one of the largest, most controversial, and widely-publicized cases in the history of the federal courts.

Warrick's lack of training soon revealed itself. On the weekend of July 4, 1994, Warrick attended a barbecue with most of the jurors at a juror's house. JTr. 50:25-52:15, 78:12-79:12, 140:3-4, 262:17-64:2. He volunteered his opinion – just after they had found ExxonMobil reckless and potentially liable for punitive damages – that they were "doing a good job." ER 286. The jurors who attended the barbecue were made uncomfortable by Warrick's presence; several of them thought correctly that it was entirely improper for him to be there. JTr. 51:24-52:10; ER 277, 283, 285, 286; *see* 38/6985:16-18. In other contexts, as well, the jurors noticed Warrick's interest in their affairs, describing him as "very nosy and overly interested in what they were doing." ER 286. Jurors commented that whenever they opened the jury room door they would find Warrick leaning against the wall as if to eavesdrop on their deliberations. JTr. 212:24-13:8.

Jurors had also been aware from the outset that this was a major case that provoked intense community interest.[3] This was confirmed following their verdict in Phase II (compensatory damages), generally regarded as a loss for the plaintiffs. ER 65. The next morning, three dead salmon were left at the home of one juror. JTr. 195:6-18. The same malicious act occurred, twice more, at the home of Rita Wilson. JTr. 233:20-36:2. None of the incidents was

[3] The jurors were a "little upset" at the start of the trial when one juror passed around the room a copy of a newspaper identifying all the jurors and where they lived. JTr. 117:14-18:14, 167:14-21. As one said, "I live amongst fishermen and oil men down there, and you know [if] they don't like the verdict, you know, what am I opening myself up for?" JTr. 113:7-9.

233:20-36:2. None of the incidents was reported to the Court or counsel, but some, and perhaps all, of the jurors were aware of them. JTr. 75:17-23, 112:9-14, 161:5-25, 211:6-13, 234:4-11. The jurors viewed the dead salmon as messages from persons interested in the trial and unhappy with the outcome of Phase II. JTr. 75:13-76:4, 112:9-14, 233:20-23, 234:4-11, 235:14-36:2.

A major, controversial, and difficult case, and an untrained and irresponsible security officer with a penchant for interference in the jury's deliberations: these ingredients began to come together on Sept. 2, 1994 — Day Four of the punitive damages deliberations, the Friday before Labor Day, and the jurors' thirty-second day of deliberations. Mrs. Wilson, who had been holding out against an award of punitive damages, ER 359, was discovered outside the jury room "in some emotional distress," 45/7686:9-10, "obviously quite distraught," and "sobbing." 44/7679:17-18. The CSO on duty that day was Warrick, JTr. 266:7-19, and several of the other jurors observed him talking to Mrs. Wilson. JTr. 180:3-15, 197:9-16.

When the jurors returned from the Labor Day weekend, Warrick accosted Juror Doug Graham. As Graham testified, Warrick "kind of motioned for me to come over." JTr. 141:11-13. Graham "tried to beeline," but Warrick "motioned me over there." JTr. 141:14-18. Warrick "said something about ... you're really having problems with [Rita Wilson], or something like that." JTr. 141:17-23. Then Warrick "removed his firearm from his holster . . . with his right hand, opened up the cylinder and removed a bullet and held it out to him and stated something to the effect of 'putting Rita out of her misery,' or 'She needs to be put out of her misery.'" ER 276, 281-82, 318:22-19:8, 320:15-23; JTr. 141:23-25. Warrick "acted like he wanted me to take ahold of the bullet or something," which "just totally freaked me out" and "really shook me up." JTr. 142:1-9. Graham said later he had been "stunned." ER 276, 321:8-13. Gra-

ham told the jury foreman about the incident, ER 277, 322:19, and may have told other jurors. JTr. 142:3-4.

All this occurred at a critical point in the jury's deliberations. At 12:55 p.m. on Sept. 6, 1994, Judge Holland received a note from the jury stating that the jury had reached an impasse. ER 78. Judge Holland refused to accept the jury's statement that it was at an impasse, denied defendants' motion for mistrial, 45/7684:12-90:18, 46/7701:22-23, and ordered the jury to continue deliberating, 45/7688:15-90:13.

Just after deliberations for the day had ended – *after* Mrs. Wilson had already left the courthouse – the district court received another note from the remaining jurors. 46/7696:4-10. In the note, the remaining jurors advised the district court they had "one juror that we feel is emotionally unable to deliberate within the Jury instructions," and that "we have reached a crucial stage in our deliberation that has left us concerned about her emotional and physical health." ER 79; 46/7696:15-19.

The next morning, Judge Holland ascertained from the foreman that Mrs. Wilson was the hold-out juror, and called her in to meet with him and with counsel. 46/7694:11-13, 7695:25-96:6. Concerned about the potentially coercive effect of singling out one juror for questioning, defendants requested that other jurors be interviewed about any problems impeding deliberations. 46/7694:23-95:3. Judge Holland rejected this suggestion. 46/7695:7-11. While questioning Mrs. Wilson, Judge Holland revealed to her the note from the other jurors questioning her "emotional and physical health" and suggesting none too subtly that she should be dismissed from the jury. 46/7696:15-20. He also revealed to Mrs. Wilson that her husband had visited the court, without telling his wife, to express concern about the stress she was under, 46/7697:1-10 – a disclosure that "shocked" her. JTr. 63:25-64:1. Notwithstanding all of this, Mrs. Wilson told the district court that she wished to continue to serve because

she felt that she "ma[d]e a difference." 46/7698:1-18. The district court sent her back to deliberate. 46/7698:19-25.

The deliberations were extremely stressful. Mrs. Wilson soon sent out a note to the district court "in substance asking to be excused from the jury." JTr. 257:1-2. Without consulting further with counsel, Judge Holland had an ex parte meeting with a weeping Rita Wilson at the jury room door, and, according to his own account, told her "that I could do nothing further at this time beyond telling her to follow the Court's instructions." ER 80. Both Mrs. Wilson and the other jurors understood that the district court had now rejected her request to get off the jury. JTr. 64:5-6, 15-17, 100:7-10, 166:25-167:4, 198:14-17, 257:1-11.

Rita Wilson's husband later testified that, "[a]t that point she really felt trapped." JTr. 257:9. He further testified that she believed that she would be put in jail if she chose not to continue deliberating. JTr. 254:11-23. Mr. Wilson gave this testimony on June 14, 1995, when the district court called him in to testify in place of his wife. The district court twice rejected ExxonMobil's efforts to take testimony from Mrs. Wilson directly. ER 118, 134 & n.8. Nevertheless, when Mrs. Wilson was finally allowed to speak for herself, in March 1998, she made plain why she had felt trapped and threatened. Warrick was at the center of the trouble.

Mrs. Wilson reported that on at least three occasions after Judge Holland had declined to discharge her, Warrick threatened her. WTr. 33:11-34:4. First, she identified Warrick as the source of her belief, which her husband had already reported back in 1995, that she could be held in the jail downstairs in the court house. WTr. 7:18-8:1. Mrs. Wilson also testified that Warrick showed her his gun and a bullet, just as he had done with Juror Graham. WTr. 27:11-28:2; *see also* 8:24-9:3. Finally, Mrs. Wilson testified that Warrick had gone so far as to explicitly threaten her, telling her he "had a gun and he could make me go back in [the jury room] by gunpoint," WTr. 43:16-18, and that if she were

"shot, accidentally, with a throw-away gun on break . . . [she] wouldn't be able to prove who did it," WTr. 7:9-17; *see also* WTr. 28:5-13.

Mrs. Wilson testified that as a result of the threats made to her, she acquiesced in a $ 5 billion punitive damages verdict with which she did not agree. WTr. 38:14-16. When she realized what she had done, she attempted suicide: "I had planned on, when they polled the jury, saying no that wasn't my verdict. I was threatened in the hall with my daughters and I took two weeks to look at myself and realized I'd done the worst thing in the world, I'd lied in federal court. And I was the worst person on earth and so that led to my suicide attempt." WTr. 38:14-19; ER 97. More than three years after that, the memory of these events was still painful for Mrs. Wilson. During most of her testimony, she was sobbing and visibly upset.

2. *The Facts Come to Light*

Of the facts in the preceding section, none was known to ExxonMobil when the verdict was rendered except those that occurred in open court and in chambers when counsel were present. Everything else was discovered later. This section describes how.

Local Rule 83.1(g) of the District of Alaska rules forbids lawyers to contact jurors after a trial. But on January 22, 1995, the *Anchorage Daily News* published an extensive account of the jury deliberations. ER 87-101. For the first time, the article reported that dead salmon had been thrown on jurors' lawns, and also reported that matters the trial court had excluded from evidence because of their prejudicial value had nevertheless reached the jury. The article also revealed that Rita Wilson had been the lone holdout against the award of punitive damages, and that following the verdict she had attempted suicide in remorse at her vote. ER 94-95, 97. Based on this article, ExxonMobil asked the district court to conduct an evidentiary hearing on the issues raised. The district court granted the motion, ER 102, with the im-

portant exception that it refused to take testimony from Mrs. Wilson. ER 118.

On June 13 and 14, 1995, the district court took testimony from all the other jurors, as well as from Rita Wilson's husband. JTr. 1-282. The district court conducted the questioning, and severely restricted its scope. Nevertheless, part of the truth began to emerge. Juror Doug Graham testified that Warrick had pulled him aside while he was entering the court house:

> [H]e motioned me over there and he said — like I say, I can't specifically tell you when, but I think it might have been right after the incident when Rita went out into the whatever you call it, vestibule, or whatever out there, and said something about, you know, you guys, you're really having problems with her, or something like that, pulled his gun out, took a bullet it [sic] out and said maybe if you put her out of her misery or something. He acted like he wanted me to take ahold of the bullet or something, and I said, I got to go, and that just totally freaked me out.

JTr. 141:17-42:3. This was the first report of this incident; the *Anchorage Daily News* had not mentioned it. Summoned by the district court in response, Warrick committed a federal crime. Under oath, he categorically denied Graham's allegations: "It was not me. . . . I haven't heard anything so absurd in my life. Nothing like that ever came from me." JTr. 269:8, 270:18-71:2.

Rita Wilson's husband testified about the severe stress on his wife during the deliberations. He told the district court that "she really felt trapped" after the jurors' effort to get rid of her. JTr. 257:9. He said his wife feared she would be put in the jail downstairs in the court house and brought up to deliberate during the day. JTr. 254:11-23. And he added that he thought that her fears about "the jail downstairs" had come from remarks either by the district court or by a security guard. JTr. 240:22-41:9, 241:23-42:10, 253:21-54:18.

Six months later, on Feb. 19, 1996, the district court denied ExxonMobil's motion for a new trial. ER 159. Judge Holland found that Mrs. Wilson had not been coerced by any influence outside the jury room, and that the court's own ex parte instructions and contacts with her had had no coercive effect. ER 167-79. In a key finding he later came to regret, ER 353-54, Judge Holland accepted Warrick's perjured denial of the incident rather than the testimony of Juror Graham: "[T]he court is not convinced that the incident ever occurred." ER 179-80.

A chance event reopened these matters, eighteen months later. On August 11, 1997, ExxonMobil's Anchorage counsel received a letter from counsel for plaintiff in a lawsuit captioned *Shepard v. General Securities Service Corp.*, No. F96-061 CV (D. Alaska), then pending in the district court in Fairbanks. ER 201-16. Defendant was the security company that employed Warrick. Plaintiff was a female security officer whom Warrick had caused to be fired, and who was suing for wrongful termination and sex discrimination. *Id.* Plaintiff's counsel learned that the United States Marshals Service had investigated Warrick's misconduct in connection with the *Exxon Valdez* trial, that Warrick had been repeatedly placed under polygraph examination, that he had *admitted* the incident with Juror Graham, that he lost his job as a result, and that a report existed of the Marshals Service investigation.[4] ER 228-31, 238-44, 248. When counsel for the United States refused to produce this report in discovery, plaintiff's counsel wrote to ExxonMobil's counsel on the sensible assumption that since the investigation pertained to extraordinary misconduct in connection with the *Exxon Valdez* case, the Marshals Service would have given ExxonMobil's counsel a copy. ER 253-54.

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[4] The Marshals Service advised Warrick's supervisor that all copies of the report were maintained outside Alaska because the report was "potentially explosive" with "far reaching consequences if it got into the wrong hands." ER 248.

But of course ExxonMobil knew nothing of this. It was later revealed that the Marshals Service investigation had been conducted *with the knowledge and permission of Judge Holland*, ER 271:9-72:8, 273:5-13, 315:6-317:18, but neither Judge Holland nor the Marshals Service ever disclosed the existence, let alone the results, of the investigation to ExxonMobil.

ExxonMobil moved the district court for a new trial on the ground of newly discovered evidence, and its then-pending appeal was remanded to permit limited discovery on the motion. Discovery revealed that the Marshals Service had indeed carried out an investigation, in the fall of 1995. The investigators had interviewed four jurors and Warrick, and put Warrick and Graham under polygraph. ER 281-286, 296-98. Graham passed but Warrick failed. ER 297, 296. Confronted with the polygraph results, Warrick admitted the incident with Graham. ER 300-02. As a result, he was removed from his job on Dec. 8, 1995, at the direction of the United States Marshal. ER 229:20-30:8. He died a few months later, in April 1996. ER 217.

Discovery also shed light on the manner in which the investigation had been conducted. It began in June 1995, just after the district court took testimony from ten of the jurors. ER 270:5, 313:1-6, 314:8-25. Marshal Murphy paid a call on Judge Holland to tell him that the investigation was going forward. Judge Holland told Murphy "to do what you have to do," but, without explanation, instructed him *not* to report the results of any investigation back to the Court. ER 273:5-13. He also limited the scope of the investigation. When Senior Deputy Marshal Riffe remarked that he would like to interview every juror, Judge Holland advised that only three or four specified jurors (not including Rita Wilson) needed to be interviewed, and that he wanted a "very low-key" investigation. ER 316:10-317:13.

On Feb. 19, 1996, when the district court denied ExxonMobil's motion for new trial on the ground that the

incident with Juror Graham had not happened, the Marshals Service had known for two months that the incident *had* occurred, *and* that Warrick had perjured himself in the testimony on which the district court was relying. ER 300-02, 179-80. The district court's finding was thus contrary to facts the district court would have known but for its instruction to the Marshals Service not to advise the court of the results of the investigation.

But the full story was not yet known even when the Marshals Service investigation was finally disclosed in February 1998. The Marshals Service had never contacted Mrs. Wilson. ER 104:13-24. Accordingly, ExxonMobil moved the district court – a third time – to take her testimony. ER 259. This time, Judge Holland granted the motion. ER 263. The result was Rita Wilson's testimony set forth in the preceding section. Sobbing and upset, she revealed, at long last, what had actually happened.

B. District Court Ruling

After Mrs. Wilson's testimony, the parties filed supplemental briefs on ExxonMobil's motion for new trial. CD 7163. On July 31, 1998, the district court entered its Order No. 339, denying the motion. App. 24a. With respect to the incident involving Juror Graham, the court found that the incident had occurred, but that Graham had not been "coerced," and that the incident had not affected his deliberations. App. 32a.

The district court found that Mrs. Wilson was sincere and that she believed what she said. App. 42a. Judge Holland nevertheless disregarded *all* her testimony. He found that she had "unintentionally and mistakenly incorporated the incident between CSO Warrick and Graham into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen." App. 41a. In making this finding, Judge Holland relied on his own *ipse dixit*, as there was no evidence (expert or otherwise) to support it. The Judge made *no* finding concerning

Mrs. Wilson's testimony that Warrick had told her she would be put in the jail downstairs in the court house if she did not continue to deliberate – indeed, he did not even mention it.

C. Court of Appeals Opinion

On appeal, the Ninth Circuit concluded that CSO Warrick's intrusions into the jury's deliberations – while concededly improper – did not justify a new trial on punitive damages. The court recognized that when it is established that "extraneous information" has been imparted to the jury, prejudice is presumed and the party defending the verdict bears the burden of proving that the information was not of a kind that that would have affected the reasonable juror. App. 8a. Applying a distinction unique to Ninth Circuit case law, however, the court further concluded that this case did not involve extraneous information, but instead a distinct species of outside influence on the jury – namely, "ex parte contacts." *Id.* Under Ninth Circuit precedent, such contacts are not considered to be so troublesome as extraneous information, and thus no presumption of prejudice arises from such contacts unless they are first determined to be "inherently coercive." App. 9a. The Court of Appeals agreed with the district court that the contacts were not "inherently coercive," and therefore imposed on ExxonMobil the burden of proving that CSO Warrick's improper intrusions had caused "actual prejudice" to ExxonMobil. Unsurprisingly given this standard, the court held that ExxonMobil was not entitled to a new trial. App. 9a-10a.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW TO RESOLVE A SHARP DIVISION IN THE FEDERAL CIRCUITS OVER THE CONTINUED VALIDITY OF THE *MATTOX/REMMER* RULE

For more than a century this Court has recognized the proposition, fundamental to our adversarial system of justice, that any communications with the jury about a case other

than the presentations of the parties and the on-the-record instructions from court are "absolutely forbidden and invaldiate the verdict unless their harmlessness is made to appear." *United States v. Mattox*, 146 U.S. 140, 150 (1892). Because any external contact with the jury about the case – unintentional or not – presents a risk that the jury will not base its decision solely on the record and applicable law, proof of the existence of such contacts erects a presumption of prejudice, *Remmer v. United States*, 347 U.S. 227, 229 (1954), requiring that the party defending the verdict establish that the verdict was free from the taint of external influence. *Id.*[5]

Within the last two decades, however, several of the federal circuits have refused to apply the *Mattox/Remmer* presumption except in limited circumstances, and some have held that it no longer applies at all. As the Sixth Circuit has observed:

> Prior to 1982, it seems to have been the consistently applied rule that, upon exposure [of] a jury to a potentially prejudicial communication, it was the government's burden to prove that the jury had not been biased by the communication. Since *Smith v. Phillips*, 455 U.S. 209 (1982), however, there has been split among the federal circuits with respect to

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[5] *Mattox* and *Remmer* were criminal cases, but "because the integrity of the jury system is no less to be desired in civil cases," *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983), the federal circuits have uniformly applied common principles in criminal and civil cases alike. *See, e.g.*, App. 7a n.4 ; *Waldorf v. Shuta*, 3 F.3d 705, 712 (3d Cir. 1997); *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 922 (10th Cir. 1992); *Stephens v. South Atl. Canners*, 848 F.2d 484, 488-89 (4th Cir. 1988); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977). In any event, this federal common-law punitive damages proceeding was an exercise of the federal government's authority to inflict punishment on its citizens – a proceeding to which heightened protections attach. *See Oberg*, 512 U.S. at 530-31.

> split among the federal circuits with respect to the burden of proof.

United States v. Walker, 1 F.3d 423, 431 (6th Cir. 1993). Other circuits also have acknowledged this division over whether subsequent decisions of this Court have abandoned or altered the *Mattox/Remmer* rule. *See, e.g., United States v. Angiulo*, 897 F.2d 1169, 1185 (1st Cir. 1990) (opinion of the court, joined by Breyer, C.J.) ("Although the government is careful to cite the two circuit court opinions that have accepted, in whole or in part, this abandonment theory, it neglects to cite to any of the many circuit opinions that resoundingly have rejected this abandonment theory." (citations omitted)); *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998) ("notwithstanding the view of the Sixth Circuit that *Remmer* is no longer controlling . . . many of our cases have continued to recognize the presumption of prejudice"); *United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985) ("The *Phillips* case, contrary to the Sixth Circuit's analysis [in *United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984)], did not confront the issue of burden of proof but rather concerned the necessity for a hearing on the issue of juror partiality."); *United States v. Dutkel*, 192 F.3d 893, 896 (9th Cir. 1999) ("[W]e do not believe that any of the Supreme Court's intervening opinions have spoken to the special case of jury tampering and we must therefore disagree with [*United States v.*] *Sylvester*, [143 F.3d 923 (5th Cir. 1998)].").

The consequence of this disagreement is that in some courts of appeals – including the court below – the party victimized by an improper contact still bears the burden of proving *actual prejudice* from the external influence. This burden is made especially heavy by Federal Rule of Evidence 606(b)'s rule against inquiry into jurors' subjective thought processes. If – as happened here – courts conclude in the first instance that an improper contact was objectively *not* likely to influence the verdict, then it is all but impossible to show by objective evidence alone that the contact *did*

influence the verdict. Whether, and in what form, the *Mattox/Remmer* presumption applies is thus a question with serious consequences, and the division in the courts over the question necessarily means that the outcomes in like cases will vary with the circuit in which they arise. *See, e.g., Pennell*, 737 F.2d at 532 (affirming judgment but acknowledging that if "*Remmer* were controlling," judgment likely would be reversed). The Court should grant review to resolve this important conflict over the status of the *Mattox/Remmer* rule.

A. This Court's Precedents Regarding Review Of Verdicts Possibly Prejudiced By Improper External Influences

As context for our description of the split in lower court authority, we begin by briefly recounting this Court's own relevant precedents.

This Court first squarely addressed the question at issue in *Mattox v. United States*, 146 U.S. 140 (1892). In that case – a federal criminal prosecution – jurors had overheard a bailiff commenting on the defendant's past criminal record, and a newspaper account of the case lauding the government's closing argument had been left in the jury room. *Id.* at 142-43. The trial court refused to consider juror affidavits describing these facts on the ground that juror testimony impeaching the verdict was inadmissible. This Court reversed, holding that even though jurors may not offer evidence as to their state of mind or reasons for reaching the verdict, they may submit objective evidence as to "overt acts" of external influence that may have occurred. *Id.* at 148-49. Turning to the question whether the affidavits in that case were "material" evidence of prejudice, the Court answered with an unequivocal yes:

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, unless their harmlessness is made to appear.

Id. at 149.

The Court next addressed the problem of improper external influences in *Remmer v. United States*, 347 U.S. 227 (1954), and *Remmer v. United States*, 350 U.S. 377 (1956) (*Remmer II*). In that case - another federal prosecution - a juror had been approached by a third party about the case, and the FBI had conducted an inquiry into the matter, including an interview with the juror during the trial. The lower court refused to conduct a hearing into the defendant's assertion of prejudice resulting from the contacts. This Court reversed and ordered a hearing, observing:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. at 229. On remand, the trial court found no prejudice, and this Court *again* reversed, this time reviewing the entire factual record and concluding that the contacts were of such a kind that the juror involved was necessarily prejudiced. *Remmer II*, 350 U.S. at 377.

The Court returned to the issue in a state case arising on habeas, *Parker v. Gladden*, 385 U.S. 363 (1966). Like *Mattox*, *Parker* involved an inappropriate comment by the bailiff overheard by several jurors. The federal court granted a writ of habeas corpus, and this Court affirmed. The bailiff's comments, the Court held, deprived defendant of his constitutional rights to trial by an impartial jury and to cross-examine witnesses against him. 385 U.S. at 364.

The next two cases were also habeas cases. In the first, *Smith v. Phillips*, 455 U.S. 209 (1982), it was discovered after trial that during trial a juror had submitted an application for employment with the office of the district attorney that was prosecuting the defendant. The state courts refused to grant a new trial, but the federal district court, while finding insufficient evidence that the juror was actually biased, held that bias was conclusively "implied" under the circumstances, and granted the writ. This Court reversed that judgment, rejecting the claim that bias must be implied even where no actual prejudice had been shown. Rather than adopt the doctrine of implied bias as a "conclusive presumption" in some cases as urged by concurring and dissenting Justices, *see Phillips*, 455 U.S. at 209 (O'Connor, J., concurring); *id.* at 232 (Marshall, J., dissenting), the majority held that because the Constitution requires only that the defendant be afforded a fair and impartial jury and trial procedures, *see id.* at 217, habeas relief may not be granted so long as the state court ensured that no actual prejudice occurred: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215 (citing *Remmer*). The Court did not, however, say anything about whether a defendant could make such proof by way of a rebuttable evidentiary presumption in the defendant's favor.[6]

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[6] It is not clear, in any event, that the Court *could* have required such a presumption in *Phillips*, which arose on habeas review of a state-court proceeding. As the *Phillips* Court observed, "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. No such wrongs occurred here." *Phillips*, 455 U.S. at 221; *see also Dickerson v. United States*, No. 99-5525, slip op. at 8 (June 26, 2000) ("With respect to proceedings in state courts, our authority is limited to enforcing the commands of the United States Constitution." (internal quotation marks omitted)). The *Mattox/Remmer* presumption of prejudice, in other words, may not be in and of itself a constitutional command, but instead a rule of evidentiary procedure prescribed by this Court on direct review of federal cases to protect the underlying constitutional right, which is the

The next case, *Rushen v. Spain*, 464 U.S. 114 (1983), is to the same effect. In that case, a state trial judge had failed a communication with a juror about a concern the juror raised during trial. The lower federal courts had granted habeas relief on the simple ground that "an unrecorded ex parte communication between trial judge and juror can never be harmless error." *Id.* at 117. This Court rejected that view in a short, per curiam opinion, holding consistent with *Phillips* that the "prejudicial effect of a failure to [disclose a judge/juror communication] . . . can normally be determined by a post-trial hearing." *Id.* at 119. Like *Phillips*, *Rushen* is silent with respect to any presumption applicable in that hearing.

The final relevant case is *United States v. Olano*, 507 U.S. 725 (1993), which involved the presence of an alternate juror in the jury room during deliberations in violation of Fed. R. Crim. P. 24(c). The defendant argued that such an "intrusion" into the jury required automatic reversal, but the Court held the error was subject to harmless-error review for its prejudicial effect on the verdict: "We generally have analyzed outside intrusions upon the jury for prejudicial impact." *Id.* at 738 (citing *Remmer* and other cases). While suggesting that some types of intrusion might be so severe or problematic as to warrant a *conclusive* presumption of prejudice, *id.* at 739-40, the Court concluded that a *Remmer* hearing would be appropriate for resolving most questions of prejudice. *Id.* The Court did not speak at all to the question whether a *rebuttable* presumption applies in such cases, and if so under what circumstances.

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right to a fair and impartial jury. It is notable that in the earlier habeas case *Parker v. Gladden*, the Court did not discuss a presumption of prejudice, but instead ordered habeas relief because of the violation of the underlying constitutional right.

B. The Division In The Federal Circuits Over The Continuing Validity And Applicability Of The *Mattox/Remmer* Presumption of Prejudice

There is a fundamental disagreement in the federal circuit courts of appeals over the question whether *Phillips*, *Rushen*, and *Olano* affected the continuing validity of the *Mattox/Remmer* presumption. The Sixth Circuit has concluded that the presumption has been abandoned altogether. In direct conflict with the Sixth Circuit, the First, Seventh, Tenth and Eleventh Circuits have held that the presumption must be applied in every case involving evidence of an external influence on the jury. Most of the other circuits, including the court below, have taken a middle ground, reading *Phillips* and the other decisions to retreat from or modify the presumption in various and conflicting ways. We discuss the divergent approaches circuit-by-circuit.

First Circuit: The First Circuit follows the *Mattox/Remmer* presumption faithfully:

> *[A]ny* unauthorized communication between any person who is associated with the case, or who has an interest in the outcome of the case, and a juror would have the potential for being prejudicial. The court would then need to conduct sufficient inquiry to determine whether the communication was harmless.

United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992) (emphasis added); *see also United States v. Gaston-Brito*, 64 F.3d 11, 13 (1st Cir. 1995) (same).[7]

Second Circuit: The Second Circuit also continues to apply the presumption in all cases. *See United States v. Wiley*, 846 F.2d 150, 157 (2d Cir. 1988); *United States v.*

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[7] A panel opinion issued shortly after *Angiulo* suggested that the *Remmer* presumption arises only where there are "significant" or "aggravated" ex parte juror contacts, *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir. 1990), but the court declined to so limit *Remmer* in its later decisions in *O'Brien* and *Gaston-Brito*.

Weiss, 752 F.2d 777, 782-83 (2d Cir. 1985). *Cf. Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994) (presumption applies on "direct review of federal convictions," but more limited rule applies in habeas proceedings).

Third Circuit: The Third Circuit applies a modified version of the *Mattox/Remmer* rule. In contrast to the Fifth and Sixth Circuits, the Third Circuit explicitly held in *United States v. Console*, 13 F.3d 641 (3d Cir. 1993), that *Phillips* "did not reject *Remmer*'s presumption of prejudice," distinguishing *Phillips* on the ground that it "did not involve a third-party communication with a juror regarding the matter pending before the jury." *Id.* at 666. The court also distinguished earlier Third Circuit decisions refusing to apply any presumption of prejudice, *e.g.*, *United States v. Gilsenan*, 949 F.2d 90 (3d Cir. 1991); *Waldorf v. Shuta*, 3 F.3d 705, 710 (3d Cir. 1993), on the ground that those cases involved media publicity and not direct third-party contacts with jurors, *see Console*, 13 F.3d at 666. In cases involving media publicity, the court explained, a presumption of prejudice arises only when the publicity is "aggravated." *Id.* The court did not explain the logic underlying a "media publicity" exception to *Remmer*, and no other Circuit recognizes it.

Fourth Circuit: The Fourth Circuit has also modified the *Mattox/Remmer* presumption, though slightly, applying it only to cases in which the party challenging the verdict makes a threshold showing that the ex parte contact was "more than innocuous." *Stephens v. South Atlantic Canners*, 848 F.2d 484, 488-89 (4th Cir. 1988). If that minimal showing is made, the presumption of prejudice arises, and the other party must establish that there is "no reasonable possibility that the jury's verdict was influenced by an improper communication." *Id.*; *see Howard v. Moore*, 131 F.3d 399, 422 (4th Cir. 1997); *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996).

Fifth Circuit: In direct conflict with the First, Second, Seventh, Tenth, and Eleventh Circuits, the Fifth Circuit has

held that "the *Remmer* presumption cannot survive *Phillips* and *Olano*." *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998). Unlike the Sixth Circuit, on the other hand, the Fifth has not rejected the *Remmer* presumption in all cases; its view is that the presumption "is not triggered automatically but [is] imposed at the discretion of the district court," *id.* at 933, where the party challenging the verdict first shows that prejudice is a "likely" result of particular improper contacts. *Id.* at 934.

Sixth Circuit: The Sixth Circuit has rejected *Remmer* explicitly. *See United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984). Focusing on the statement in *Phillips* that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which *the defendant has the opportunity to prove actual bias*," *Phillips*, 455 U.S. at 215 (emphasis added), the Sixth Circuit concluded that *Phillips* puts the burden on the defendant in all cases "to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed." *Pennell*, 737 F.2d at 532. *See also United States v. Zelinka*, 862 F.2d 92, 95-96 (6th Cir. 1988); *United States v. Howard*, 752 F.2d 220, 223-24 (6th Cir. 1985).

In a strong dissent in *Pennell*, Judge Celebrezze argued that the statement in *Phillips* regarding the defendant's opportunity to prove bias at a hearing said nothing at all about whether the defendant could prove such bias *by way of a presumption*, as the *Remmer* Court had held: "Under *Remmer*, a defendant has the burden of establishing that the unauthorized juror contact was prejudicial; the defendant is *aided* by a presumption that prejudice did arise from unauthorized juror contact. In the absence of evidence to the contrary, a presumption operates to invalidate any verdict." *Pennell*, 737 F.2d at 539 (Celebrezze, J., dissenting). *Phillips*, Judge Celebrezze correctly pointed out, was simply "another case which rejects the use of a *conclusive* presumption of prejudice under circumstances which are not extreme." *Id.* at 539-40.

Seventh Circuit: The Seventh Circuit applies the *Mattox/Remmer* presumption in all extraneous juror influence cases. *See Schaff v. Snyder*, 190 F.3d 513, 533 (7th Cir. 1999); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984).

Eighth Circuit: The Eighth Circuit follows a *Mattox/Remmer* regime that is perhaps second only to that of the Ninth Circuit in terms of doctrinal confusion. In the Eighth Circuit, courts will presume prejudice from an ex parte jury contact, but only where the contact "relates to *factual* matters at issue in the case." *United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir. 1995) (emphasis added). "When an extrinsic contact relates to *legal* issues, the presumption of prejudice does not apply." *United States v. Blumeyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) (emphasis added); *see Estrada*, 45 F.3d at 1226 (no presumption where jury "is exposed to extraneous information merely supplementing the Court's legal instructions"); *see also United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988). In *Blumeyer*, the Eighth Circuit applied this rule to affirm a criminal conviction despite evidence that the jury foreman contacted an outside attorney with a question of law during deliberations. 62 F.3d at 1016-17.

None of the Eighth Circuit opinions identifies a source in this Court's precedents for the dichotomy between extraneous factual information and extraneous legal information, nor has any other Circuit adopted that distinction.

Ninth Circuit: The opinion below reveals some – but not all – of the Ninth Circuit's schizophrenia on the *Mattox/Remmer* presumption.

The Ninth Circuit initially applied a full *Mattox/Remmer* presumption, explicitly rejecting the Sixth Circuit's conclusion that *Phillips* had effectively overruled *Remmer*. *See United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985). Subsequent opinions retreated from *Littlefield* without overruling it; as the opinion below explains, Ninth Cir-

cuit precedents now "distinguish between introduction of 'extraneous evidence' to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case." App. 7a. In cases involving extraneous information, the presumption of prejudice applies. *Id.* at 8a; *see United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991). But where there is "only" improper external influence on the jury's deliberations, as in this case, there is generally no presumption and the aggrieved party must prove that "actual prejudice" resulted from the influence. App. 8a; *see United States v. Madrid*, 842 F.2d 1990, 1091-93 (9th Cir. 1988). A rebuttable presumption *may* arise in a case involving an improper non-information external influence, but only where the influence has *already* shown to be "inherently coercive." App. 9a.

On top of all this, the Ninth Circuit has added the rule that when "tampering" is involved, the *Mattox/Remmer* presumption still applies automatically, *United States v. Dutkel*, 192 F.3d 893, 896 (9th Cir. 1999) – even though tampering does not involve "extraneous information" and may not be "inherently coercive."

None of this Court's precedents, of course, distinguish between external contacts involving information related to the case and other kinds of external influences. Indeed, *Remmer* itself involved an intrusion into a juror's deliberations – an FBI interview of a juror – that was *not* evidence or information about the case. Nor do this Court's cases limit the presumption to intentional jury tampering. It would be surprising if the Ninth Circuit's balkanized *Mattox/Remmer* regime were the correct one – certainly no other Circuit has followed the Ninth in this area – but if so, it is all the more reason for this Court to grant review and make that clear.

Tenth Circuit: The Tenth Circuit follows *Mattox* and *Remmer* without qualification: "The law in the Tenth Circuit is clear. A rebuttable presumption of prejudice arises *whenever* a jury is exposed to external information in contraven-

tion of a district court's instructions." *Mayhue v. St. Francis Hosp., Inc.*, 969 F.2d 919, 922 (10th Cir. 1992) (emphasis added); *see United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997) ("It is well-settled that a jury's exposure to extrinsic information gives rise to a rebuttable of prejudice."); *United States v. Scisum*, 32 F.3d 1470, 1482 (10th Cir. 1994) (*Remmer* "applies to every non-public non-record communication with a juror at any point in a criminal case"); *United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir. 1988).[8]

Eleventh Circuit: The Eleventh Circuit also applies the *Remmer* presumption: "[P]rejudice is presumed the moment the defendant establishes that extrinsic contact in fact occurred." *United States v. Martinez*, 14 F.3d 543, 550 (11th Cir. 1994); *see United States v. Pessefall*, 27 F.3d 511, 515 (11th Cir. 1994); *United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986).[9]

D.C. Circuit: Mirroring the general confusion among the circuits, cases within the D.C. Circuit currently reflect an intramural conflict on this question, as discussed in *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998). On the one hand, *Gartmon* observes, cases like *United States v. Butler*, 822 F.2d 1191, 1195-96 & n.2 (D.C. Cir. 1987); *United States v. Fafowara*, 865 F.2d 360, 363 (D.C. Cir. 1989); and *United States v. Williams*, 822 F.2d 1174, 1188 (D.C. Cir. 1987), all "continued to recognize the presump-

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[8] In one isolated case, the court suggested that the presumption arises only for "certain types of extraneous information," *United States v. Simpson*, 950 F.2d 1519, 1522 (10th Cir. 1991), but the opinion did not define the limitation, and both earlier and later cases make clear that the Circuit recognizes no such limitation.

[9] One early Eleventh Circuit panel did hold that "prejudice is not presumed" and that the defendant "has the burden of demonstrating prejudice by a preponderance of credible evidence." *United States v. Rowe*, 906 F.2d 654, 657 (11th Cir. 1990). But *Martinez* expressly declined to follow *Rowe*, *see Martinez*, 14 F.3d at 550 n.3, and the court's later opinion in *Pessefall* follows *Martinez* rather than *Rowe*.

tion of prejudice and to place the burden of disproving it on the government." *Gartmon*, 146 F.3d at 1028. On the other hand, *Gartmon* continues, the court in *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996), had "questioned the continued breadth of *Remmer*," *Gartmon*, 146 F.3d at 1028, and "suggested that the cases no longer treat the presumption as 'particularly forceful,'" *id.* (quoting *Williams-Davis*, 90 F.3d at 496). With the last word on the subject, the *Gartmon* Court left the intracircuit conflict to fester. *See id.* (concluding that on facts of the case the court "need not resolve this debate, or the tension in our own cases").

C. This Case Demonstrates That The Circuit Conflict Over The Validity And Applicability Of The *Mattox/Remmer* Presumption Has Significant Consequences For Litigants' Rights To A Fair And Impartial Jury

The sheer number of federal circuit court opinions cited in this petition – which is by no means exhaustive – shows that the question of how to treat the *Mattox/Remmer* presumption is an important one that continues to vex the courts on a widespread and continuing basis. And it is clear that each circuit's resolution of this problem makes a substantive difference in individual cases. Indeed, in the leading circuit court opinion rejecting *Remmer*, the Sixth Circuit explicitly acknowledged that the use of the presumption likely would have made a dispositive difference in the outcome of the appeal. *Pennell*, 737 F.2d at 532. While it is obviously impossible to say that in every case, it is necessarily so in a substantial number, because of the effect of the longstanding rule – now codified in Fed. R. Evid. 606(b) – that while jurors may testify as to objective events that could have had an effect on their deliberations, they may *not* give evidence as to the actual, subjective effect of those events on their deliberations.

The Ninth Circuit's rule, as applied to the facts of this case, perfectly illustrates the problem. Assuming that

Mattox and *Remmer* remain good law, it is clear that CSO Warrick's concededly improper contacts with the jury should have created a strong presumption of prejudice, and required a new trial of the punitive damages issues in the absence of a showing (not made here) that there was no reasonable possibility that the jury was *not* prejudiced. When Warrick brandished a firearm, handed Juror Graham a bullet, and suggested that Mrs. Wilson should be put "out of her misery," the unmistakable import of his comments was that Warrick was not on Mrs. Wilson's "side" in the jury's deliberations; that Mrs. Wilson, not the other jurors, was the "problem"; and that the other jurors had legitimate reason to be unhappy about Mrs. Wilson. That message is not neutral. Any reasonable juror would take away from it the message that a court officer was expressing an opinion on the deliberations, and in particular that the court officer thought Mrs. Wilson was in the wrong. The objective effect of Warrick's conduct can only have been to delegitimize – indeed demean – Mrs. Wilson's views, to diminish her influence with the jury, and to push the jury in the direction of a verdict contrary to Mrs. Wilson's views.[10] That is precisely the kind of unbalanced interference with the jury's deliberative process that this Court's cases universally forbid. *Parker*, 385 U.S. at 365; *Remmer II*, 350 U.S. at 382. Clearly the risk that the communication was "possibly prejudicial," *Mattox*, 146 U.S. at 149, was at least as great here as the ambiguous, unresolved FBI interview at issue in *Remmer*. And the flagrant misconduct here simply bears no relation to the trivial or casual

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[10] Thus the Ninth Circuit's suggestion that Graham took Warrick's remarks as "a tasteless joke," App. 4a, is entirely beside the point: even assuming it *was* a joke, the only point of the joke was that *Mrs. Wilson was the one causing trouble.* Thus, whether Warrick was "joking" or not, the message conveyed to any reasonable juror is exactly the same, and necessarily prejudicial. In any event, Graham *never* said he though Warrick's comment was a "joke." Rather he said that it "totally freaked me out," "really shook me up," and "threw me for a loop," or that he was "stunned." *Supra* at 7.

contacts that were held non-prejudicial in *Phillips* or *Rushen* or *Olano*.

But in the Ninth Circuit, no presumption of prejudice arises in a non-tampering ex parte contact case unless the court *first* decides for itself that the contact is "inherently coercive." App. 9a. If not, then the party challenging the verdict may prevail only by proving "actual prejudice" from the contacts. *Id.* The Catch-22 is obvious: because of Rule 606(b), the party may only prove prejudice by showing that the contact was coercive as an objective matter, but of course the court in rejecting the presumption has already concluded that the contact was *not* coercive as an objective matter. So it was here. Because the court concluded that Warrick's conduct did not "inherently coerce" the jury, the court did not afford ExxonMobil the benefit of the *Mattox/Remmer* presumption – even though by any standard the communication was "possibly prejudicial" and thus well within the *Mattox/Remmer* rule.

This case shows why a litigant in the Ninth Circuit (and certainly in the Fifth and Sixth) is much less likely than one in the First, Second, Seventh, Tenth or Eleventh to be able to prove that his or her right to a fair and impartial jury was adversely affected even by concededly improper – or, as in this case, frankly outrageous – intrusions into the jury's deliberations. Had this case arisen in the latter circuits, ExxonMobil would have received the benefit of the presumption, and respondents would have been required to establish that, in light of all the objective facts and circumstances of the case, there was no "reasonable possibility" that that the jury was prejudiced by Warrick's conduct. *United States v. Sanders*, 962 F.2d 660, 668 (7th Cir. 1992) (internal quotation marks omitted).[11]

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[11] It is worth noting in this regard that the *Mattox/Remmer* rule need not present the same unfair Catch-22 for a party defending a possibly tainted verdict as the Ninth Circuit's rule does for a party challenging one. Properly applied, the rule does not mean that the presumption of

But what truly matters for purposes of these jurisdictional papers is that even if *Smith*, *Rushen*, and/or *Olano* are read – incorrectly, in our view – as having undercut the fundamental principles of *Mattox* and *Remmer*, until the earlier cases are overruled by this Court the federal circuit courts are required to continue to apply them where, as here, they are directly applicable. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). And the undeniable fact is that only some federal circuits continue to adhere to those cases, while others do not. This case, then, is a classic one for the exercise of this Court's certiorari jurisdiction: the decision of the Ninth and other Circuits not only "conflict[s] with the decision[s] of [other] United States court[s] of appeals on the same important matter," S. Ct. R. 10(a), but at the same time the Ninth and other Circuits have also "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* 10(c).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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prejudice will be impossible to rebut in every case. As the Second and Seventh Circuits have recognized explicitly, the "quantum of proof" necessary to rebut the presumption depends on the nature of the contact in question. *Evans v. Young*, 854 F.2d 1081, 1083 (7th Cir. 1988); *see Weiss*, 752 F.2d at 783. When the presumption applies, it may still be rebutted if the trial court concludes, after reviewing all the objective facts and circumstances of the case – such as the nature of the contact, the length of the jury's exposure to it, the relationship of the contact to the issues in the case, and the strength of the parties' cases, *see Blumeyer*, 62 F.3d at 1017; *Mayhue*, 969 F.2d at 923-24; *Bayromoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) – that the party defending the verdict has shown that there is no "reasonable possibility that the verdict was affected by the contact," *Sanders*, 962 F.2d at 668 (internal quotation marks omitted).

Respectfully submitted,

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Dated: July 14, 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM MCMURREN; PATRICK L. MCMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SAILS; RAPID SYSTEMS PACIFIC LTD., *Plaintiffs-Appellees,*

v.

ALYESKA PIPELINE SERVICE CO.; EXXON CORPORATION; EXXON SHIPPING COMPANY, *Defendants,*

and

JOSEPH HAZELWOOD, *Defendant-Appellant.*

SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM MCMURREN; PATRICK L. MCMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SAILS; RAPID SYSTEMS PACIFIC LTD., *Plaintiffs-Appellees,*

v.

EXXON CORPORATION; EXXON SHIPPING COMPANY, *Defendants-Appellants,*

and

ALYESKA PIPELINE SERVICE COMPANY, *Defendant.*

In re: THE EXXON VALDEZ,

SEA HAWK SEAFOODS, INC.; COOK INLET PROCESSORS, INC.; SAGAYA CORP.; WILLIAM MCMURREN; PATRICK L. MCMURREN; WILLIAM W. KING; GEORGE C. NORRIS; HUNTER CRANZ; RICHARD FEENSTRA; WILDERNESS SAILING SAFARIS; SEAFOOD SAILS; RAPID SYSTEMS PACIFIC LTD., *Plaintiffs-Appellees,*

v.

EXXON CORPORATION; EXXON SHIPPING COMPANY, *Defendants-Appellants,*

and

ALYESKA PIPELINE SERVICE COMPANY, *Defendant.*

Nos. 98-35796, 98-35807, 98-36087, & 98-36117.

Appeals from the United States District Court
for the District of Alaska
H. Russell Holland, Chief District Judge Presiding.
D.C. No. CV-89-00096-HRH
Argued and Submitted
May 3, 1999
Filed March 16, 2000

Before: James R. Browning, Charles Wiggins,[1]
and Andrew J. Kleinfeld, Circuit Judges.

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[1] The Honorable Judge Charles E. Wiggins, who was a member of the panel, died on March 2, 2000. He had concurred in this opinion before his death.

OPINION

KLEINFELD, Circuit Judge:

This is one of several appeals before this panel relating to the *Exxon Valdez* oil spill litigation. the subject of this appeal is whether the$5 billion punitive damages verdict against Exxon, and the $5,000 punitive damages award against Hazelwood, should be set aside because of irregularities during jury deliberations. We affirm the district order that it should not. This decision goes only to the motion to vacate the judgment for irregularities during jury deliberations. It does not purport to decide the issue of the amount of damages, compensatory and punitive, awards to the plaintiffs.

I. Facts

This case was tried in three separate phases. the phase with which this appeal is concerned was the punitive damages determination. After the jury awarded $5 billion, defendants filed numerous motions, and appealed from the judgment and from denial of its motion for new trial. While that appeal was pending, newly discovered evidence persuaded the district judge, and us, that remand was appropriate, under *Crateo, Inc. v. Intermark, Inc.*,[2] for consideration in the trial court. We remanded for consideration of the Rule 60(b)(2) motion for relief from judgment based on the newly discovered evidence. This appeal concerns only the second motion for new trial, based on the newly discovered evidence, not the first motion for new trial, so we do not discuss the facts and legal determination raised in the earlier motion. Captain Hazelwood, who piloted the *Exxon Valdez* in the accident, appeals, but simply joins in the arguments by Exxon Corporation and Exxon Shipping Company, so we describe the appellants collectively as "Exxon."

A retired police officer from Florida served as a Court

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[2] *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976).

Security Officer during the trial and deliberations. He was experienced and much decorated, as a police officer and before that in the military. He acted as one of the bailiffs, maintaining security for the jury room, escorting the jury, attending to its requests for food and other needs, and receiving its communications. The punitive damages phase of the trial took more than four months, so all the participants had considerable contact with each other.

An Anchorage newspaper published a story after the trial describing the extremely stressful summer in the jury room.[3] One of the jurors, Juror A, was especially distressed and was not getting along well with the rest of the jury. That had been obvious to all participants, because she cried in the hall and otherwise acted distressed, and because the jury sent out notes expressing concern about her mental condition. Based on some of the allegations in the article, the district court held an evidentiary hearing in which the jurors were questioned by the judge under oath in open court with counsel present about possible irregularities.

One juror, Juror B, testified that the bailiff motioned him aside as he came to deliberations one morning and "said something about, you know, you guys, you're really having problems wit her, or something like that, pulled his gun out, took a bullet out and said maybe if you put her out of her misery or something." Juror B said he might have told the jury foreman about it, but told no one else, and "it really shook me up." Juror B perceived the remark as a tasteless joke rather than as a threat or serious suggestion. The bailiff testified under oath that "I haven't heard anything so absurd in my life. Nothing like that ever came from me." The district judge ruled that "the court is not convinced that the incident ever occurred," but that if it did, it did not warrant a new trial, because Juror A never learned of the communication, and Juror B and the jury foreman did not understand it

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[3] *See The $5 Billion Jury*, Anchorage Daily News, Jan. 22, 1996, at A1.

to be a threat directed at them.

The United States Marshall in Anchorage, John R. Murphy, directed the investigation of the alleged incident. Juror B passed a lie detector examination, and the bailiff's lie detector examination "indicated deception" in the opinion of the polygraph examiner, investigator Robert Sheldon. Sheldon later confronted the bailiff about aspects of his interrogation that appeared contradictor. the bailiff then admitted that the bullet incident occurred as Juror B described it, but that he "was joking" and that "nothing was meant to be . . . a threat or intimidation." Marshal Murphy told the bailiff that because he had lied, the Marshals Service would pursue terminating him unless he resigned. The bailiff turned in a written resignation within five minutes. Marshall Murphy did not tell the district judge or the lawyers that Juror B had been telling the truth and that the bailiff had lied. The bailiff died of a heart attack a few months after being forced to resign, prior to adjudication of the second motion to vacate the judgment. At the time the district court denied Exxon's motion, partly on the basis of believing the bailiff's false testimony, all these events had already transpired, and the Marshal knew the bailiff was lying and that the gun incident had occurred. But the judge did not.

Exxon's lawyers did not know anything about the Marshal's investigation of and report on the bailiff. It was secret. but a lawyer in Fairbanks happened to be representing a woman there is a wrongful termination casein which the bailiff figured, and he had done discovery that disclosed the existence (but not the contents) of the report. He wrote Exxon's lawyers, assuming they knew more than he did, and saying that he had found out in discovery that a supervisor of the bailiff had written in his notes that the report was "potentially explosive" but claimed not to recall why, and the United States Attorney's office objected to disclosing the report or to deposing Marshals Service personnel about it. He hoped to obtain a copy of it from Exxon's lawyers, not realizing that he knew much more about it (such as that it

existed) than they did.

After following up on this tip, Exxon filed a second motion for new trial. Though the gun incident described above brought about the motion, Exxon claims that additional incidents also entitle it to relief. In addition to the remark and display of the gun to Juror B, the bailiff had had other contracts wit the jurors that Exxon claims entitle it to a new trial. Also, Juror A testified that when she asked the bailiff what would happen if she simply refused to come t the courthouse and deliberate any more, he told her that she could be arrested and put in jail. Also, she testified that one of the other jurors made a remark to her which she understood as a threat to harm her daughters if she did not say that she agreed with the verdict when the jury was polled.

ANALYSIS

A. The bailiff's gun remark

Exxon argues that the bailiff's remark to Juror B, in the context of other contacts that it argues were inappropriate for a bailiff, entitles it to have the $5 billion punitive damages verdict vacated and a new trial ordered.

The district judge held extensive evidentiary proceedings, and made extensive findings of act in support of its denial of the motion for new trail. On the second motion, after the bailiff had been forced to resign for lying, the court found that the incident occurred as Juror B had described it. The district court characterized the bailiff's "maybe if you put her out of her misery" remark as "potentially coercive," but noted that the "potential coercion was not directed at Juror [B]." The juror toward whom the remark might be potentially coercive was Juror A, but she did not know about it during the deliberations and verdict. The juror to whom the remark was made, Juror B, and the jury foreman, to whom Juror B may have repeated it, were not the objects of any coerciveness. The district court expressly found that "Juror [B] was not coerced by the incident and that, with the possible exception of the jury foreman, the other jurors did not learn

of the incident during the time they deliberated." Based on these factual findings, the district court concluded that the bailiff's "maybe if you put her out of her misery" remark and display of the gun, though potentially coercive, was not in fact coercive conduct.

The district court therefore treated the bailiff's remark and conduct as an inappropriate *ex parte* contact rather than coercion. The court concluded that "Exxon has not shown prejudice or that the incident between [the bailiff] the Juror B affected the verdict." Based on Exxon's failure to show actual prejudice, the district court concluded that a new trial was not warranted on this ground.

There was testimony that the bailiff had dropped by a Fourth of July picnic the jurors had. Some jurors thought he should not have been there, though the juror who hosted the picnic apparently invited him. Also, while on a weekend drive in the neighborhood of one of the jurors, Juror C, the bailiff and his wife dropped by the house of Juror C, and his wife. Juror C was a gold miner, and lived in a rural area an hour or two out of Anchorage. The two couples had coffee and chatted about guns, but not about anything trial related. The district judge found that the bailiff attended the fourth of July picnic and had social encounters with Juror C. the court found that these contacts were "not coercive in nature or effect." The district court concluded that because the contacts were no coercive, the burden was on Exxon to show prejudice, and it had not.

Our precedents distinguish between introduction of "extraneous evidence" to the jury, and *ex parte* contacts with a juror that do not include the imparting of any information that might bear on the case. Our precedents are mostly in criminal cases, but we have applied the same rules in civil cases.[4] Were extraneous information is imparted, as when

[4] *See Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (stating that reliance on criminal cases is appropriate because the "integrity of the jury system is no less to be desired in civil cases." (quoting *United States v. Barfield*, 359 F.2d 120, 124 (5th Cir. 1966)).

papers bearing on the facts get into the jury room without having been admitted as exhibits, or when a juror looks things up in a dictionary or directory, the burden is generally on the party opposing a new trial to demonstrate the absence of prejudice, and a new trial is ordinarily granted if there is a reasonable possibility that the material could have affected the verdict.[5]

But this is not an extraneous information case. The bailiff did not tell Juror B anything about the facts or the law. He made a strikingly tasteless joke about Juror A, arising out of her conspicuous emotionality, departure from the jury room, and crying. "Where ex parte contacts are involved, the defendant will receive a new trial only if the court finds 'actual prejudice' to the defendant."[6] This standard applies to *ex parte* contacts when, as compared to extraneous information, they do not pertain to " 'any fact in controversy or any law applicable to the case.'"[7] The contact by the bailiff here was *ex parte* in the same sense the clerk's contact with a crying juror was in *Madrid*. Both cases involve an inappropriate response by court staff to emotion and bickering in the jury room, where the staff contact did not involve any communication bearing on the substantive matters before the jury.[8] The heightened standard for motions for new trial, burden on the movant to show actual prejudice, therefore applies to the bailiff's contact. Our review, where, as here, the district judge has held an evidentiary hearing, is marked by "special deference to the trial judge's impression of the impact of the evidence."[9]

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[5] *See United States v. Maree*, 934 F.2d 196, 200-01 (9th Cir. 1991); *see also United States v. Madrid*, 842 F.2d 1092, 1093 (9th Cir. 1988).

[6] *Maree*, 934 F.2d at 201 (citing *Madrid*, 842 F.2d at 1093).

[7] *See id.*

[8] *Madrid*, 842 F.2d at 1091.

[9] *United States v. Plunk*, 153 F.3d 1011, 1024 (9th Cir. 1998).

While an *ex* parte remark may in come circumstances merit a rebuttable presumption of prejudice because of its inherently coercive effect, as where a judge instructs a juror exparte regarding the verdict,[10] the bailiff's tasteless joke did not merit ay such presumption. It did not purport to tell the individual to whom it was directed, Juror B. what his decision in the case ought to be or how he should make it. The bailiff was not telling him he should shoot Juror A, and Juror B did not understand the remark to mean that. the district judge made a finding of fact that "[Juror B] treated this encounter as a bad joke." We defer to this finding of fact as our precedents require.[11]

Exxon argues for application of the standard, more liberal toward grants of new trial, for juror coercion and extrinsic evidence. However, as *Madrid* illustrates, the problem of court personnel making inappropriate remarks to deal with crying jurors who are not getting along with their fellow jurors arises from time to time, and is ordinarily dealt with as an *ex parte* contact case, under the standard requiring the movant to demonstrate actual prejudice.[12]

Exxon has not cited any precedent for applying the extrinsic evidence or coercion standard to an *ex parte* contact case such as this one. these *ex parte* contact cases use a different standard from extrinsic evidence and coercion cases both because *ex parte* contacts are less likely to do any harm to the deliberative process than extrinsic information or coercion, and also because such contacts are very hard to avoid. "[I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."[13] Long trials are especially vulnerable to *exparte* con-

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[10] *Cf. United States v. United States Gypsum*, 438 U.S. 422, 462 (1978); *Jenkins v. United States*, 380 U.S. 445, 446 (1965).

[11] *See Valley Eng'rs, Inc. v Electric Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir. 1998), cert. denied 119 S. Ct. 1455 (1998).

[12] *See Madrid*, 84 F.2d at 1091.

[13] *Rushen v. Spain*, 464 U.S. 114, 118 (1983).

tacts, because people around the courthouse get to know the jurors, and it becomes much harder for jurors and others to preserve an artificial social isolation as days stretch into weeks. Publicity creates a shower of *ex parte* contacts on the jurors. They become celebrity magnets to aspiring "inside dopesters," and also because ordinarily social people are naturally inclined to make small talk about what they heard in the news. Except in large cities, at least some jurors in long trials are reasonably likely to see the judge, witnesses, court personnel, and lawyers at school events, concerts, sporting events, or the grocery store, where social contact is hard to avoid. In a long, high publicity case, a new trial on account of *ex parte* contacts is likely to be no more pure than the first trial. Retrial of a publicized case introduces the additional distortion that jurors in the retrial are likely to have trouble distinguishing what they heard from the publicity after the first trial from what they heard in the courtroom in the second.

Exxon also argues that the district court, in the course of finding that the "maybe if you put her out of her misery" remark was taken as a "bad joke," violated the rule against inquiring into the effect of a statement during deliberations on a juror's state of mind.[14] The rule does not apply. It is limited to effects on the juror's state of mind "as influencing the juror to assent to or dissent from the verdict,"[15] or "concerning the juror's mental processes in connection therewith."[16] Juror B's testimony was not about his mental processes in connection with the verdict. He was asked what he understood the bailiff's words to mean, that is, whether they were a bad joke or a serious suggestion that he shoot Juror A. that had no bearing at all on whether Exxon should pay punitive damages and how much it should pay. *Rushen* establishes that "[a] juror may testify concerning any mental bias in mat-

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[14] Fed. R. Evid. Rule 606(b).

[15] *Id.*

[16] *Id.*

ters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror's attention," even though the rule prohibits a juror from testifying "about the mental process by which the verdict was arrived."[17] Likewise, in *Madrid* we considered the juror's statement that she "did not think" that the court clerk was trying to influence her verdict, when the clerk found her crying after another juror had sworn at her, and told her she should settle her differences with that juror.[18]

The bailiff certainly should not have made his tasteless joke to Juror B. However, after careful review of the extensive evidentiary record and scrutiny of the district court's findings, we conclude that the district court correctly categorized the bailiff's conduct and words as an inappropriate *ex parte* contact with a juror that did not introduce extraneous information into the deliberations and was not, in context, actually coercive. Our precedents therefore require that in order to obtain a new trial on account of it, Exxon would have to demonstrate actual prejudice. It did not.

B. The bailiff's alleged threats to Juror A

Exxon also argues that it is entitled to a new trial because of newly discovered evidence that the bailiff coerced Juror A. Its theory is that the bailiff threatened both to kill her and also to lock her in jail if she refused to deliberate further. during the extensive evidentiary proceedings on the first motion for new trial, she had made no such allegations. Her emotionally distraught condition had been apparent to the judge and other court personnel, because she ran out of the jury room crying more than once, and her husband had come to court to talk to the judge about how upset she was. But she had not made her accusations of coercion by the bailiff until after the newspaper publicity about denial of the first

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[17] *Rushen*, 464 U.S. at 121 n.5.

[18] *See Madrid*, 842 F.2d at 1092.

motion for new trial, that she did not ever tell him that the bailiff or any other court employee had made any communication to her that she considered inappropriate. He testified that she told him the guards outside the jury room tried to "calm her down" and "console her" "with hugs and words." regarding jail, Juror A's husband testified that his wife felt "penned up" as "everybody does" in a jury, and that "if she chose not to come back, that they would put her in the jail downstairs and bring her up to deliberation during the day," but he did not testify as to who she said told her that. The judge had not required Juror A to testify on the first motion because of her ill health, and Juror's A's husband expressed appreciation for that.

When the second motion for a new trial was made, Juror A was required to testify. Her testimony was strikingly different from anything that had been heard before. According to what she said in 1998, three and a half years after the trial, she knew about the bailiff's display of the gun when it happened, because the other jurors told her "[t]hat I was wanted dead." Two of the jurors did not tell her that, but the other nine and also the bailiff "were very creative at telling me how I could be killed." Asked what the bailiff said when he told her he wanted her dead, Juror A gave this response:

> [One juror] could have a heart attack; it would be my fault. [The jury foreman] could start smoking and that would be my fault. I could be shot, accidentally, with a throw-away gun on break and wouldn't be able to prove who did it. Or one of the jurors could just accidentally get in the deliberation room with a gun. One day I was very upset and one of my things was just to walk in the little room outside the deliberation room and [the bailiff] told me that he could kill me and no one would know . . . and the other jurors would back him up.

Asked if the bailiff ever took a bullet of his gun and showed it to her, Juror A gave this response:

> He loaded his gun, yeah . . . . I don't know anything about guns, and he just had this bullet and he put it in and asked me – I don't remember. Oh, we just – two weeks of terror and I don't know what day it was, but it was something about Russian roulette or something. That's the only time I saw the bullet.

Juror A, during this same line of questioning, gave this description of the threat to put her in jail:

> I asked him if I just didn't show up one day what they would do. He said they would arrest me and there was a jail downstairs and I could spend nights in the jail and they would bring me up for deliberation, and it wouldn't solve anything in my life, because home was the only thing that was saving my sanity.

She testified that eight other jurors "most definitely" wanted her dead.

- One, who scared her by "throwing things at me," threatened to rape her, suggesting that rape "would straighten me up." This juror, as the jurors were lined up to reenter the courtroom and deliver their verdict, also made what Juror A took to be a threat against her daughters, discussed in the next section: "he told me that my daughters were very good-looking and to think about that when I gave my vote."
- Another was "big on killing me" by smuggling a knife into the jury room in a cup of ice, and "cutting my body up and flushing it down the toilet."
- Another, who "was slimy, acting like he was on the take," "told me how to commit suicide."
- Another suggested that the first would "make me come to my senses" through the use of murder or violence.

- Another "had a vacation, that was the most important thing. If it meant killing me, fine. She had a real important vacation."
- There were also various "comments about shooting me."

According to the Juror A, once it started, the open discussion of how to kill her came up every day in the jury room.

Juror A testified that she did not tell her husband or anyone else about the death threats from the bailiff and the others at the time. The she forgot about them, and had no recollection of the bailiff displaying the gun or bullet until her husband told her that the incident with Juror B had been reported in the newspaper. After her husband told her about the story in the newspaper about the display of the gun and bullet to Juror B, then "things started coming back." Juror A kept a personal journal during the trial, but she did not mention the bailiff's threat to kill her or any of the other death threats in the journal. She also talked to numerous journalists, but did not tell any of them about it. She claimed to receive numerous written death threats, but did not save any of them or show any of them to anyone. Juror A subsequently attempted suicide, and was under medical care at the time of her testimony. She attributed her suicide attempt to delivering a verdict that was not her true verdict, because of the threat to her daughters.

Exxon's argument focuses upon the alleged threats by the bailiff, not on the alleged threats by the other jurors, so the restrictions on upsetting a verdict because of what went on in the jury room have no application. There was no objection to the testimony about what went on in the jury room, and it is summarized above because it bears on the credibility determination the district judge made.

The district judge was present when Juror A testified. He had arranged an informal setting for her testimony, a deposi-

tion in a lawyer's office with himself and one lawyer for each side present, instead of testimony in court with all the many lawyers involved, in order to provide her with a less stressful environment. He did not believe that the incidents she described involving the bailiff – the gun display, the Russian roulette comment, the threat to put her in jail – had actually happened. The judge was now well aware that the bailiff could not be assumed to have acted properly. And the bailiff had died of a heart attack shortly after being required to resign, so he could not contradict Juror A's account, which she had not remembered while he was alive.

The district judge nevertheless concluded, applying a pre-ponderance of evidence standard, that the events Juror A now described had not actually occurred. He found that Juror A was telling what she believed to be the truth and not lying, but that what she described as a new memory was actually a false memory stimulated by the newspaper account of the bailiff's contact with Juror B, and mediated through her own high level of emotion:

> [Juror A] more probably than not did not learn of the bullet incident involving [the bailiff] and Juror [B] during the time the jury was deliberating. Rather, the court finds that she learned of this incident later, more probably than not as a result of publicity following the court's denial of Exxon's first motion for a new trial .... The Court finds that [Juror A] has unintentionally and mistakenly incorporated the incident between [the bailiff] and Juror [B] into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen.

As a result, the court explicitly found that "[Juror A] did not have any inappropriate, threatening, or coercive encounter with [the bailiff] during jury deliberations," and concluded that Juror A "was not the subject of coercive conduct or other impermissible communications from [the bail-

iff] . . . during jury deliberations."

The district judge gave extensive reasons for his conclusion. Among them were these:

- He had extensive opportunities, during the trial and deliberations, and during the deposition, to observe Juror A's demeanor, and it showed an emotional condition not consistent with reliability of her report. At the deposition, where she had no personal stake *unlike a litigant in court), and was questioned by a lawyer with a gentle, soft manner, she began trembling the fist minute, and within ten minutes "her entire body was trembling" and she was crying, yet unlike most stressed witnesses in court, she had no trouble speaking and "appeared oblivious to the violent trembling of her limbs and copious weeping." There was "no objective reason for [Juror A] to be fearful or emotional," and her "severe trembling and copious weeping was a wholly inappropriate response to the circumstances" and "cast substantial doubt upon the reliability of what she has said."
- Her testimony about the bailiff and also about what the other jurors said and did was "bizarre and shocking."
- According to the other jurors, Juror A had never mentioned being threatened by the bailiff.
- Juror A's husband testified that Juror A had never told him of any communications with "anyone associated with the court" that she deemed to be inappropriate. In fact, Juror A's husband stated that Juror A often received consoling "hugs and words" from the bailiffs immediately outside the jury deliberation room.
- As he personally observed them during delibera-

tions, "other jurors appear to have been concerned for Juror A's emotional well-being" during deliberations.

- Juror A kept a journal during the deliberations, yet "[n]one of the incidents which she now recalls and attributes to [bailiff] are mentioned in the contemporaneous journal."

The district judge was acutely aware that, the last time he had disbelieved a story about highly inappropriate conduct by the bailiff, he had been mistaken. He said that his own words in his previous finding "have now come back to haunt this judge," and in his order expressly addressed his "own embarrassment over learning that the 'bullet incident' between [the bailiff] and Juror [B] in fact occurred." But he was not prepared simply to assume that any accusation of any similar incident was true, without careful examination of the evidence, because "[t]hat would be unfair to the plaintiffs and to the ten other jurors."

Exxon argues that the district judge should have believed at least part of what Juror A said the bailiff had done, and part is enough to obtain a new trial. Because the district court held extensive evidentiary hearings and made findings of fact, we review the findings of fact to determine whether they are "clearly erroneous."[19]

Exxon argues that Juror A's testimony "is validated first and foremost by Juror A's attempted suicide." We do not see why. The suicide attempt can just as reasonably be interpreted as an indictor of extreme emotional distress or de-

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[19] *See US v. Hanley*, 190 F.3d 1017, 1031 (9th Cir. 1999) ("We review the district court's denial of a motion for a new trial on the asserted ground of juror misconduct for an abuse of discretion. '[A]lthough we review alleged incidents of juror misconduct independently, we must accord special deference to the trial judge's impression of the impact' of the alleged misconduct. We review the district court's credibility determinations and findings of historical fact for clear error." (internal citations omitted)).

pression that might distort the individual's ability to perceive and remember social occurrences accurately. Exxon argues that something must have happened to precipitate Juror A's emotional distress during the deliberations. but we know that an entirely innocent, highly stressful event occurred that would cause emotional distress – two weeks of intense jury deliberations in an important case.

Exxon argues that Juror A's emotional response was proof of the truth of what she was saying." Again, we do not understand why. "Inappropriate affect" is a term any judge has heard many times from psychiatric witness testifying to an emotional disorder, such as depression, which would more likely distort an individual's perceptions and memories of social interactions than validate them. Exxon says that "[t]he district court simply did not get it," because the emotions would naturally flow form Juror A's distress about having been threatened with death, but that assumes what is to be proved, that she was in fact threatened with death. Juror A's explanation of why she had not brought up any of the death threats before, "I'd forgotten," would raise serious doubts in any rational finder of fact about whether she had a normally functioning memory.

Exxon argues that the district judge engaged in "judicial psychologizing" that he "was patently unqualified to perform," when he attributed Juror A's testimony to a false memory, because such analysis can only be performed by experts. Exxon cites cases in support of its argument,[20] but they are not on point. They hold that a district court erred in not allowing a defendant to put psychiatric evidence before he jury to show that he suffered from a mental defect that would cause him to make a false confession,[21] that a plaintiff

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[20] *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995); *Claar v. Burlington Northern R. co.*, 29 F.3d 499 (9th Cir. 1994); *Franklin v. Shelton*, 250 F.2d 92 (10th Cir. 1957).

[21] *See Hall*, 93 F.3d at 1344-45; *Shay*, 57 F.3d at 133.

needed some expert witness evidence to show causation between certain physical conditions and claimed chemical exposure,[22] and that a mother bringing a negligence claim was not competent to testify as to her child's internal injuries due to a car accident.[23]

The "judicial psychologizing" argument lacks merit. Any judge or juror assigned the task of deciding whether a juror's account of facts is true must necessarily consider the juror's ability accurately to perceive, remember and relate those facts. Where the judge or juror has good reason to think that the account of the facts is false, yet the witness has no apparent reason to lie, the finder of fact necessarily must think about why the witness might give a false account while attempting to tell the truth. Juror A's account was, as the district judge noted, so unlikely as to be highly implausible. Far from being inappropriate "amateur psychologizing" as Exxon contends, the district judge's careful analysis focused on factors that juries are routinely instructed to consider: "the witness' memory"; "the witness' manner while testifying"; "whether other evidence contradicted the witness' testimony"; "the reasonableness of the witness' testimony in light of all the evidence"; and "any other factors that bear on believability."[24]

Exxon argues that we must reverse because the district judge did not explicitly and separately discuss Juror A's allegation that the bailiff threatened her with jail if she refused to come to court and deliberate. This part of her account did not suffer from the implausibility of the rest of it, because court-houses ordinarily have holding cells for prisoners, and it may be that there are circumstances where a recalcitrant juror could be brought in and held pursuant to a bench war-

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[22] *See Claar*, F.3d at 104.

[23] *See Franklin*, 250 F.2d at 97.

[24] Ninth Circuit Manual of Model Jury Instructions, Civil, Form 3.7 (1997).

rant.[25] But the district judge did not have this allegation in isolation. Juror A testified that the bailiff made this threat in the conversation where he threatened to kill her, and testified to it in the series of answers where she described all the lurid ways she could be killed.

It is logical to disbelieve even a plausible allegation if a witness makes it in the course of a generally implausible account. Suppose, hypothetically, a person says "I saw a woman milking a cow." That is plausible. Now suppose the persons goes on to say "and the woman and cow were inside a horse's head, and there was another woman who was walking upside down on the roof of an upside down house." In light of these additional statements, it is not sensible to say, as Exxon's arguments implies, "well, she must have seen something, and a woman milking a cow is plausible, so she must have at least seen a woman milking a cow." It is far more probable that the person in not describing anything that happened in the empirical actuality of which findings of acts are made, and instead saw all this in a Marc Chagall painting (or if the hypothetical speaker is Marc Chagall, in his imagination). Juror A was not describing a Chagall painting, but she described events so unlikely, with a demeanor so extreme, that a finder of fact could reasonably conclude that she suffered from a condition that would distort her perceptions or recollections. The district judge so concluded. If a person claims to have perceived things which almost certainly did not occur, then it is reasonable to disbelieve the person's claim to have perceived things that might otherwise reasonably be thought to have occurred. The district judge did not accept the truth of anything Juror A said, because of the extreme unlikelihood of much of what she said, as well as her demeanor while saying it. We routinely instruct jurors that they "may believe everything a witness says, or part of

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[25] *See generally* 28 U.S.C. § 1866(g) (1994) (providing that juror who fails to appear pursuant to summons for jury duty and fails to show cause for failing to appear "may be fined not more than $100 or *imprisoned not more than three days, or both.*" (emphasis added)).

it, or none if it,"[26] and a judge has the same choices, for the same reasons. The district judge rejected all of Juror A's testimony, including her account of the bailiff's threat to put her in jail if she refused to come to court and deliberate. His finding was not clearly erroneous.

Exxon also argues that the district court's instructions did not adequately emphasize each juror's duty to maintain her own honest convictions rather than yield them to reach a verdict, and each juror's duty to maintain courtesy toward the other jurors. This argument could be and was made only in Exxon's first motion for new trial, not the second motion for new trial, the denial of which is the only issue before us. The second motion is based on "newly discovered evidence" under Rule 60(b)(2).[27] The judge's instructions to the jury were of course not "newly discovered evidence" years after the trial had concluded. They are therefore not before us for review. We do not intimate the judge's instructions fell outside the discretion the district court had to formulate instructions.[28]

Exxon argues that Juror A's account of the bailiff's alleged threat to put her in jail and bring her upstairs for deliberations was corroborated by her husband's testimony. It would not be decisive if it was, but in fact it was not. What he said was that his wife felt "penned up,", as jurors typically do during lengthy deliberations. He also said that "her impression" was that "if she chose not to come back, they could pt her in the jail downstairs and bring her up to deliberation during the day." he did not testify that she said the bailiff had told her this. The impression could as easily have come

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[26] Ninth Circuit Manual of Model Jury Instructions, Civil, 3.7 (West 1997).

[27] Fed. R. Civ. Pro. Rule 60(b).

[28] *See Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999) ("Because the district court has substantial latitude in tailoring jury instructions, we review the formulation of those instructions for an abuse of discretion.").

from a juror or some other acquaintance who had been on a state jury where the same question was raised, and an answer along those lines had been given. Jurors sometimes learn a lot from accounts by others of jury service in other cases.

In sum, the district Judge described the focus of his findings as being on whether Juror A had been "threatened" or "intimidated" by the bailiff. That included the alleged threat to hold her in jail if she refused to show up. He held extensive evidentiary hearings, made careful findings of fact, and found that Juror A's account, in its entirety, did not merit belief, despite its subjective honesty. These findings were not clearly erroneous.

C. Juror C's Alleged Threat

Exxon argues that the district judge was required to grant a new trial because of a threat after the jurors had reached their verdict but before they returned it in open court. When the jurors have a verdict, they typically tell the bailiff. After the judge causes the parties, counsel and others to assemble in the court, the bailiff informs the jurors, and they line up awaiting his signal to walk into the courtroom. Once in court, the verdict is handed to the bailiff or deputy clerk, who passed it to the judge to inspect for defects of form, such as illegibility or not being signed by the foreman. Assuming that there are no defects of form, the judge has the deputy clerk read the verdict out loud. Many judges, with or without a request by counsel, then have the clerk poll the jury. That means that the deputy clerk asks each of them in open court whether the verdict as read is that juror's true and correct verdict. Only after each juror says that it is, does the judge accept the verdict and direct that it be entered.[29]

If a juror says "no" during the polling in open court, then the verdict is not entered. There may be a motion for mistrial, and the judge may decide whether to discharge the jury

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[29] *See 1 Kevin F. O'Malley et al, Federal Jury Practice and Instructions,* § 9.07 (5th ed. 2000).

and declare a mistrial, or order the jury to deliberate further.[30] Juror A testified that she planned to say "no" when the jury was polled, because she recognized that as a moment when a juror enjoys a high degree of physical safety. But she was scared to do so because the jurors lined up to enter the courtroom, Juror C "told me that my daughters were very good-looking and to think about that when I gave my vote." She understood that remark to be a threat directed at her daughters.

Exxon argues that the rule against allowing a juror to impeach her own verdict[31] does not apply because the alleged remark was made after the jurors had concluded their deliberations. We need not determine whether its legal argument has any merit, a doubtful proposition,[32] because the district judge made a finding of fact, as discussed above, that Juror A's account was not worthy of belief. this finding was not clearly erroneous, so the alleged threat must be treated as imaginary.

CONCLUSION

The district court's denial of Exxon's Rule 60(b)(2) motion based on irregularities in jury deliberations is AFFIRMED.

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30 *See id.*

31 Fed. R. Evid. Rule 606(b).

32 *See Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
	)	No. A89-0095-CV (HRH)
This Order Relates to All Cases	)	

ORDER NO. 339
Exxon's Second Motion for New Trial
(Coercion of Juror)

The Exxon defendants[1] (hereinafter Exxon) have moved pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure, for a new trial as to Phase I (liability for punitive damages) and Phase III (amount of punitive damages).[2] In keeping with this court's standing orders for procedural matters in this case, Exxon sought and obtained leave for the filing of this motion.[3] Because this case was already on appeal to the Ninth Circuit Court of Appeals, the motion sought approval of an application to that court for a remand in order that the motion for new trial might be considered. The court indicated its willingness to receive a remand, and, on January 16, 1998, the court received and filed the order of the court of appeals granting the parties' joint motion for a limited re-

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[1] Exxon Corporation (D-1) and Exxon Shipping Company (D-2).

[2] Clerk's Docket No. 7124. This motion was filed with the clerk of court on September 23, 1997, covered by a motion to lift stay on motion practice. Clerk's Docket No. 7116. The motion to lift stay was subsequently granted. Clerk's Docket No. 7123. Joseph Hazelwood (D-07) has joined in the motion. Clerk's Docket Nos. 7117, 7160.

[3] Order No. 335 (Oct. 9, 1997), Clerk's Docket No. 7123.

mand.[4]

Also included within Exxon's motion was a request for limited, discovery. That request was granted.[5] In earlier proceedings (which are discussed below) and as a part of Exxon's first motion for a new trial, the court conducted a hearing at which the court, with input from counsel, interviewed ten of the eleven jurors who heard Phase III of the trial of this case, the husband of the eleventh juror, a court security officer, and a deputy clerk of court.[6] Because of concerns for the health of Rita Wilson, the eleventh juror, she was not interviewed.[7] (Mrs. Wilson had experienced a blood pressure problem during closing arguments and had become very emotional during Phase III deliberations.) As a consequence of information obtained by Exxon through discovery allowed in aid of this second motion for new trial, Exxon moved for leave to depose Mrs. Wilson.[8] The court granted leave to depose her.[9]

To complete the procedural development of this motion, and as approved by the court, supplemental memoranda summing up the positions of the parties with respect to Exxon's second motion for new trial have been filed.[10]

Background

Trial of Phase I of the Exxon Valdez litigation commenced on May 2, 1994. Verdicts were returned by the trial

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[4] Clerk's Docket No. 7131.

[5] Order No. 326 (Jan. 23 , 1998) , Clerk's Docket No. 7132 .

[6] Transcript of Sealed Hearing (June 13, 1995), Ex.13 attached to Clerk's Docket No. 7164.

[7] Order No. 296 (Aug. 17, 1995), Clerk's Docket No. 6435.

[8] Clerk's Docket No. 7144.

[9] Order No. 337 (Mar. 5, 1998), Clerk's Docket No. 7146.

[10] Exxon's supplemental memorandum is at Clerk's Docket No. 7163, plaintiffs' response is at Clerk's Docket No. 7164, and Exxon's reply is at Clerk's Docket No. 7167.

jury as to Phase I (liability for punitive damages) on June 13, 1994,[11] as to Phase II (compensatory damages) on August 11, 1994,[12] and as to Phase III (the amount of punitive damages) on September 16, 1994.[13] As to Phase II, the trial jury deliberated for 23 days; as to Phase III, the trial jury deliberated for 14 days. Because of the manner in which the trial was conducted and the form of the jury verdicts rendered, there was some considerable delay in the formulation of a final judgment which was not entered until September 24, 1996.[14]

On September 6, 1995, Exxon filed its first motion for a new trial pursuant to Rule 60(b)(2) as to Phases I and III (liability for and the amount of punitive damages).[15] Pertinent to what is now before the court, this initial motion for new trial raised issues of improper contact with jurors by Court Security Officer (CSO) Warrick.[16] After reviewing the circumstances concerning a communication between Juror Graham and CSO Warrick, and using words which have now come back to haunt this judge, it was said: "The court is not convinced that the incident [between Juror Graham and the CSO] ever occurred."[17] Hedging a bit, the court went on to conclude that: "If the incident took place as Juror Graham testified, then the CSO exercised incredibly poor judgment, but such foolishness would not warrant a new trial."[18] Exxon's motion for a new trial was denied.[19]

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[11] Clerk's Docket No. 5314.

[12] Clerk's Docket No. 5714.

[13] Clerk's Docket No. 5889.

[14] Clerk's Docket No. 6911.

[15] Clerk's Docket No. 6448.

[16] Order No. 308 (Feb. 20, 1996) at 9-23, Clerk's Docket No. 6638.

[17] Id. at 21-22.

[18] Id. at 23 (footnote omitted).

[19] Id. at 25.

It is against the foregoing background that the court received and considered Exxon's second motion for new trial. In its initial submission, Exxon made a prima facie showing that the incident between Juror Graham and CSO Warrick had indeed occurred. The United States Marshals Service had independently investigated the accusation that CSO Warrick had improperly contacted a juror. Both Warrick and Graham took a polygraph test. Ultimately Warrick confessed that the incident had taken place much as Juror Graham had described it.[20] CSO Warrick was terminated and subsequently died of natural causes.

In light of this development, and because Mrs. Wilson was the focus of the CSO's conversation with Juror Graham, the court became persuaded that she was the juror most likely to have been affected by the communication with Juror Graham if it had been communicated to her.[21] Accordingly, and as set out above, the court authorized a deposition of Mrs. Wilson. By agreement of the parties, Mrs. Wilson was examined by a single attorney for each side. The deposition was conducted in the presence of the court, but in the conference room of counsel for plaintiffs. Mrs. Wilson was accompanied by her husband and her counsellor. The transcript of Mrs. Wilson's deposition has been filed with the court under seal.[22]

Timeliness of Motion

Exxon's motion for a new trial is made pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure. The rule provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the

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[20] The details of this incident were set out and discussed by the court in order No. 308 (Feb. 20, 1996) at 2I-23.

[21] Order No. 337 at 2 (Mar. 5, 1998), Clerk's Docket No. 7146.

[22] Clerk's Docket No. 7155.

> following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) .... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Plaintiffs raise the issue of the timeliness of Exxon's motion for new trial and in so doing concede, as the plaintiffs must, that the request for leave to file the instant motion was filed on the 364th day following the entry of judgment. The motion itself was timely presented. The somewhat obscure but potentially significant point as regards timeliness which the plaintiffs make is that the newly discovered evidence known to Exxon in September of 1997, upon which the instant motion is founded, was simply that the incident involving Juror Graham and the CSO occurred much as the juror contended. The details of the marshal's investigation and Mrs. Wilson's testimony all came much later and were not known by Exxon until more than a year after judgment.

Rule 60(b)(2) plainly says that one must discover new evidence and act upon it by filing an appropriate motion within a year from the entry of judgment. If a party discovers new evidence which might justify seeking a new trial more than a year after the entry of judgment, the discovery is too late. Here we have a situation which the rule and, so far as the court is aware, the text writers do not address: May a party who has timely moved for a new trial on the basis of newly discovered evidence offer further support for that motion by way of additional new evidence which was not discovered until after one year subsequent to the entry of judgment?

Plaintiffs rely upon Nevitt v. United States, 886 F.2d 1187 (9th Cir. 1989), for the proposition that the one-year period established by Rule 60 (b) is jurisdictional and not

subject to tolling. In Nevitt, and presumably here, the pendency of an appeal does not toll the one-year period. Nevitt, 886 F.2d at 1188. Nevitt, however, simply does not reach the question now before this court.

The court concludes that it has jurisdiction to entertain and decide on the merits Exxon's second motion for new trial. That motion was filed within one year from the entry of judgment, and the court has reacquired jurisdiction otherwise lost to the Ninth Circuit Court of Appeals by order of the latter court. Exxon made a prima facie showing that Order No. 337 was based in part upon the perjured testimony of a CSO. The court was requested to permit – and, in the exercise of its discretion, did permit – Exxon to undertake specific, limited discovery in furtherance of the second motion for new trial. That limited discovery led to a further motion to depose Rita Wilson which the court granted. The court concludes that Exxon is entitled to employ all of the newly discovered evidence, both that coming to their attention prior to filing their second motion for new trial, as well as that developed with court approval in subsequent proceedings on the motion for new trial.

The second motion for new trial was timely filed, and neither Rule 60(b)(2) nor any other authority called to the court's attention would foreclose the court from permitting Exxon a reasonable opportunity to further develop newly discovered evidence of substance which came to Exxon's attention prior to the one-year limitation period.

Rule 60(b) (2) Analysis

In deciding a motion based upon Rule 60 (b) (2) filed in the context of potential jury coercion, the court must undertake a two-part analysis. First, the court determines whether an evidentiary hearing-is required. United States v. Madrid, 842 F.2d 1090, 1094 (9th Cir. 1988). This aspect of the case is not in dispute. There being a reasonable possibility of prejudice to the defendants, the court permitted the parties to inquire extensively of the trial jury in connection with the

first motion for new trial and, as discussed above, granted Exxon's request for the development of new evidence of potential misconduct involving trial jurors. Neither plaintiffs nor Exxon has requested any further hearings. The hearing portion of the two-part analysis has been concluded.

The parties disagree as to the second step of the Rule 60(b)(2) analysis. Defendant contends on the basis of Remmer v. United States, 347 U.S. 227, 229-30 (1954), that contacts between court officers and jurors pertaining to the case are "presumptively prejudicial" and invalidate the verdict if harmful. Plaintiffs, on the other hand, assert that Exxon must show actual prejudice as a result of the conduct, 842 F.2d at 1093, and 'that the outcome would have been different." Hard v. Burlington Northern R.R., 870 F.2d 1454, 1461 (9th Cir. 1989).

The resolution of the foregoing disagreement depends upon whether or not the CSO's conduct amounted to coercion. A new trial is required if any communication between a court officer and juror is of a coercive nature. United States v . U.S. Gypsum Co., 438 U.S. 422, 460-62 (1978); Jenkins v. United States, 380 U.S. 445, 446 (1965). If coercive, prejudice is presumed and defendants' motion must be granted unless the harmlessness of the conduct is shown. Hobson v. Wilson, 737 F.2d 1, 47 (D.C. Cir. 1984), citing Mattox v. United States, 146 U.S. 140 (1892).

Existence of Coercion

To determine whether the CSO's actions were coercive, the court must examine the communications "in [their] context and under all the circumstances...." Jiminez v. Myers, 40 F.3d 976, 979-80 (9th Cir. 1993) (quoting Marsh v. Cupp, 536 F.2d 1287, 1290 (9th Cir. 1976) (quoting Jenkins, 380 U.S. at 446)). The court will consider the following factors in determining whether coercion is present: (1) with whom did the juror have contact; (2) the type of event alleged to be coercive; and (3) the length of time between the alleged coercive events and the verdict.

Discussion

The court now turns to its review of the newly developed evidence and application of the foregoing principles. The foregoing suggests the following issues to be decided: (1) are jurors' statements concerning contact with a CSO believable; (2) if so, was the CSO's conduct coercive; (3) if coercive, have plaintiffs demonstrated the harmlessness of the contact between jurors and the CSO; and (4) if not coercive, has Exxon shown actual prejudice and that the outcome would be different?

The primary focus of Exxon's second motion for new trial is on the conduct of CSO Donald Warrick. Exxon accuses CSO Warrick of eight separate acts of misconduct.[23] CSO Warrick is alleged to have attended a jurors' picnic on July 4, 1994. CSO Warrick is alleged to have had two separate contacts with Juror Dean. CSO Warrick is accused of the bullet incident with Juror Graham which was the subject of the court's Order No. 308. CSO Warrick is accused of lying to the court--a matter which does not appear to involve any juror directly. Finally, and most importantly, Exxon accuses CSO Warrick of three instances of improper contacts with Juror Wilson.

Juror Graham

The exchange between CSO Warrick and Juror Graham is described at some length in an earlier order.[24] Briefly summarized, it is now undisputed that a brief conversation involving a bullet and/or the CSO's weapon took place in a public area of the courthouse with Juror Graham. The inci-

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[23] Supplemental Memorandum in Support of Motion at 3-4, Clerk's Docket No. 7163.

[24] Order No. 308 (Feb. 20, 1996) at 21, Clerk's Docket No. 6638.

dent took place on or about September 7, 1994,[25] the mid-point of the 14 days of deliberations as to Phase III of the trial. The CSO lied to the parties and the court when he denied that the conversation had ever taken place. The marshal's investigation of this event shows that Graham treated this encounter as a bad joke. Graham was not sure whether he told anyone of the incident with the CSO, but says that if he told anyone it was jury foreman Murray who did not recall being informed of the encounter between Graham and the CSO.

The proof is now conclusive that the incident with CSO Warrick and Juror Graham took place. It was of a potentially coercive nature; however, the potential coercion was not directed at juror Graham, and the court finds that the incident did not adversely affect Graham's deliberations or coerce any other juror. The court specifically finds that Juror Graham was not coerced by the incident and that, with the possible exception of the jury foreman, the other jurors did not learn of the incident during the time they deliberated.[26] The lack of knowledge of the CSO/Graham incident on the part of other jurors is a matter of considerable import to which the court will return when discussing Juror Rita Wilson. Exxon has not shown prejudice or that the incident between CSO Warrick and Juror Graham affected the verdict. The court finds that the CSO's contact with Juror Graham was reprehensible but harmless.

For the reasons and upon the authorities discussed by the court in its order deciding the defendants' initial motion for new trial,[27] as modified and amplified by the foregoing, the court finds and concludes that the incident involving Juror

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[25] The incident occurred on a morning as juror Graham entered the courthouse, so it must have taken place after the events during the day of September 2, 1998, a Friday preceding the Memorial Day weekend, and therefore on September 6, 7, or 8, 1994. Transcript of juror interviews, Ex. B at 141, Clerk's Docket No. 7164.

[26] See testimony of ten jurors, Clerk's Docket No. 7164 (Ex. B).

[27] Order No. 308 (Feb. 20, 1996), Clerk's Docket No. 6638.

Graham and the CSO did not coerce a verdict.

Juror Wilson

The defendants' allegations of improprieties by a CSO in contact with Juror Wilson are by far the most troublesome and serious allegations made in support of the second motion for new trial. The plaintiffs contend that Juror Wilson's testimony is "simply not credible".[28] Exxon defends Juror Wilson's credibility, pointing out that, "[t]he liar and perjurer in this case is known."[29] Because the court was previously deceived by CSO Warrick regarding his contacts with one juror, the court has read and re-read the statements of all of the jurors taken in June of 1995 and has taken a great deal of time to consider what all have said and argued about a possible direct contact between CSO Warrick and Juror Wilson.

There have been a number of separate occasions on which the court has had an opportunity to observe and/or have some interaction with Mrs. Wilson. The first was in the course of jury selection. Mrs. Wilson's juror questionnaire gave no hint that a long trial and lengthy deliberations might be an unreasonable burden for her. The juror voir dire of Mrs. Wilson was essentially unremarkable. Second, the court had the opportunity of observing Mrs. Wilson during the course of trial. The court recalls that Mrs. Wilson was attentive. During Phase I, for reasons which are now lost to the court's memory, the court developed a concern for Mrs. Wilson's health such that when a note was received indicating that a juror was having a medical problem, the court assumed that it was Mrs. Wilson. In fact, it turned out to be a different juror who was then excused for medical reasons. Approximately one month prior to the close of testimony in Phase III, Mrs. Wilson expressed concern over her employment situation. The court personally spoke to Mrs. Wilson's

[28] Plaintiffs' Response to Exxon's Motion for New Trial at 11, Clerk's Docket No. 7164.

[29] An obvious reference to CSO Warrick; Exxon's Reply Memorandum at 3, Clerk's Docket No. 7167.

supervisor and ascertained that the supervisor was aware of Mrs. Wilson's situation and that the necessary administrative paperwork would be processed in order that Mrs. Wilson's job would not be adversely affected by her jury service. The situation appeared to present no difficulty whatever.

The circumstances of the court's third (and to this point, most direct) contact with Mrs. Wilson occurred on Thursday, September 8, 1994. These circumstances are set out in the court's order of February 20, 1996.[30] Briefly summarized, the situation was this. On September 2, 1995, a Friday prior to the Labor Day weekend, Mrs. Wilson was observed weeping in the anteroom directly outside the jury deliberation room. The court sent the jury home at this point and, on Tuesday morning, September 6, 1994, following the long weekend, gave a mild cautionary instruction to the jury suggesting that they treat one another courteously. The jury responded with a note that they were at an impasse, and the court then (the next morning) gave another, low-key instruction which in substance ignored the declaration of impasse, and suggested that the jurors take as much time as they needed to reach a verdict.[31]

On the same day, Wednesday, September 7, 1994, the jury passed a note to the court advising that a juror was emotionally unable to deliberate further. On the morning of September 8, the court ascertained that the juror in question was Mrs. Wilson, and, in the presence of counsel and on the record, inquired of Mrs. Wilson as to her situation. Mrs. Wilson expressed her desire to continue deliberations, concluding: "I feel really strong and I have to be there, I feel like that I make a difference."[32] Mrs. Wilson returned to the jury deliberation room. Shortly after the foregoing exchange, Mrs.

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[30] Order No. 308 (Feb. 20, 1996) at 10-17, Clerk's Docket No. 6638.

[31] At page 11 of Order No. 308 (Feb. 20, 1996), the court rejected Exxon's contention that this instruction was an "Allen charge".

[32] Trial Transcript, Vol. 46 at 7698, Clerk's Docket No.5807.

Wilson sent a note requesting to speak to the court again. The court met Mrs. Wilson at the jury room door and advised her that in light of what she had just said on the record, the court could do nothing further at that time beyond suggesting that the jurors follow the court's instructions.

There were five full days of uninterrupted jury deliberations between the last of the foregoing events and the day (September 16, 1994) that the Phase III verdict was returned. The jury was polled and all eleven jurors, including Mrs. Wilson, answered *in* the affirmative with respect to the entirety of the special verdict which had been reached.

Finally, and most importantly, the court observed Mrs. Wilson on the occasion of her deposition in connection with the instant motion on March 16, 1998. The deposition was arranged by the court personally through Mrs. Wilson's spouse. No subpoena was issued inasmuch as Mrs. Wilson indicated a willingness to appear voluntarily. At Mrs. Wilson's request through her spouse, arrangements were made to conduct the deposition away from the courthouse and with both Mr. Wilson and Mrs. Wilson's counsellor in attendance.

The court, plaintiffs' counsel O'Neill, and defense counsel Serdahely, as well as the court reporter, arrived at the agreed upon location for the deposition ahead of Juror Wilson. Mrs. Wilson entered with her husband and her counsellor, Karen Zenzig. Counsel sat on one side of a large conference table, and Juror Wilson, et al., occupied the other side of the table. Juror Wilson appeared apprehensive as she entered the room. The court sensed no hostility on the part of Juror Wilson or those who were with her.

Juror Wilson was sworn as a witness and Mr. Serdahely examined her on behalf of the defendants. Mr. Serdahely's demeanor was gentle. He spoke softly and calmly. He was not confrontational in any way. The questioning had not progressed more than a minute or two when the court observed that Juror Wilson's hands were trembling. By a few minutes into her examination, Juror Wilson's arms were

trembling, even though one hand was being held by her husband and the other by her counselor. By several more minutes into the examination, Juror Wilson was weeping, and within perhaps ten minutes of the start of the deposition, her entire body was trembling. Mrs. Wilson exhibited great emotional distress.

In similar stressful situations, most witnesses observed by the court have soon experienced considerable difficulty in speaking and they often find it impossible to continue answering questions until they have composed themselves. Such was not the case with Juror Wilson. She appeared oblivious to the violent trembling of her limbs and copious weeping.[33] Throughout the direct and cross-examination of Mrs. Wilson by plaintiffs' counsel O'Neill (which was more rapid and just a bit more forceful than that by defense counsel), Mrs. Wilson's demeanor remained the same.

Throughout the deposition, Mrs. Wilson gave the impression that she was well oriented as to time, place, and persons involved in the matters which were the subject of inquiry. Yet what the court observed tells a very different story. There was no objective reason for Mrs. Wilson to be fearful or emotional. The deposition was conducted at a place and under circumstances which she approved. While a lay person may often feel "butterflies in the stomach" at the prospect of testifying in a court proceeding, most soon become absorbed *in* the substance of the inquiry and appear quite at ease. Unlike many witnesses who testify before the court, Mrs. Wilson had absolutely nothing at stake. She did not stand to gain or lose anything as a result of her testimony. As a consequence, the severe trembling and copious weeping was a wholly inappropriate response to the circumstances. Given the situation and the subject matter of the deposition, the court could readily appreciate a juror expressing anger or annoyance, but the gross physiological response of Mrs.

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[33] On several occasions, Mrs. Wilson stated that she felt "embarrassed". The comments appeared not to have to do with her emotional state, but rather with the subject matter under discussion.

Wilson casts substantial doubt upon the reliability of what she has said.

The court turns now to what Mrs. Wilson told counsel and the court at the deposition held March 16, 1998. It developed at the outset that Mrs. Wilson knew who CSO Warrick was.[34] It was a matter of concern to the court and counsel whether Mrs. Wilson knew of the so-called "bullet incident" involving the CSO and Juror Graham. In response to the question, as clarified by plaintiffs' counsel, "were you ever made aware or were you aware [of that incident] at the time?", Mrs. Wilson responded, "Oh, yes, very much so."[35] What followed can only be described as bizarre and shocking. Exxon's attorney inquired as to what Mrs. Wilson recalled of the incident. The court cautioned that the participants not get into Mrs. Wilson's thought processes, and she responded with a question. "What they told me?"; whereupon the witness responded, "That I was wanted dead." Patently shocked, Mr. O'Neill interjected: "Who--I'm sorry." Mrs. Wilson went on to say in substance that the CSO and all of the rest of the jurors, except Margaret and Jewel wanted her "killed".[36]

With only a few digressions, the bulk of the remainder of

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[34] Wilson Transcript at 3. The transcript of the deposition of Mrs. Wilson is filed under seal at Clerk's Docket No. 7155.

[35] Id. at 5-6. In response to cross-examination questions on this same subject, Mrs. Wilson was asked:

> Q. So, Doug [Grahams] and the bailiff [CSO Warrick] were showing you guns?
>
> A. No, Doug didn't show me a gun, but I knew that Doug had been shown a gun. He told me he had, and then the bailiff had shownme a gun.

Id. at 25.

[36] Id. at 6.

Mrs. Wilson developed the foregoing theme.[37] Mrs. Wilson testified about several personal encounters with CSO Warrick on or about September 8, 1994, including an incident strikingly similar to the Warrick/Graham incident.[38] The court finds Mrs. Wilson's present memories of contacts with CSO Warrick and other jurors are not credible.

In explaining the foregoing, the court must first address its own embarrassment over learning that the "bullet incident" between the CSO and Juror Graham in fact occurred. In deciding Exxon's first motion for a new trial, the court in substance discounted the testimony of Juror Graham, only to learn that his rendition of the encounter with CSO Warrick was accurate and that CSO Warrick had lied to the court. It would be very easy at this juncture for the court to leap to the conclusion that, because the "bullet incident" took place with Juror Graham, the similar incident now described by Mrs. Wilson involving CSO Warrick and his weapon must also have occurred. That would be unfair to the plaintiffs and to the ten other jurors who labored for fourteen days to reach a verdict on Phase III.

In the March deposition, Mrs. Wilson accuses CSO Warrick of handling his weapon and a bullet in her presence just outside the jury deliberation room in the course of an intimidating conversation which she describes. Mrs. Wilson testified, on both direct and cross-examination, that the CSO took a bullet and placed it in his gun in her presence.[39] What surrounds this testimony is both confusing and incredible. Mrs.

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[37] In the examination of Mrs. Wilson, a lot was said without objection about interaction between Mrs. Wilson and other jurors. The court did not intervene due to the extremely stressful, although non-confrontational, nature of the discussion between counsel and Mrs. Wilson. Moreover, the court had been expressly told by Mr. Wilson in the course of arranging the deposition that he felt his wife needed to say some things to us for her own well-being.

[38] Wilson Transcript at 27-28.

[39] Id. at 8, 27.

Wilson appears to state under oath that she knew Graham had been shown a gun, and that Juror Graham told her (in the presence of the rest of the jury) that he could get a weapon from the bailiff.[40] Such is absolutely inconsistent with Graham's testimony when he was interviewed by the court in 1995. The marshal's investigation, as discussed above, has convinced the court that Mr. Graham has been truthful and that he has testified accurately when he says that no one (with tote possible exception of the jury foreman) was told of the bullet incident with CSO Warrick during deliberations. Later in her deposition, Mrs. Wilson says Juror Graham never told her about the bailiff showing him a bullet.[41] When asked whether there were other jurors of whom we might inquire on this subject, she responded "no", that the only persons who knew about the matter were "Karen and Jerry" (Mrs. Wilson's counsellor and spouse, respectively).[42]

During jury deliberations, Mrs. Wilson told other jurors the substance of what went on when she was outside the jury deliberation room.[43] According to the other jurors as interviewed in 1995, she never mentioned being threatened by a CSO. Jurors Johnson and Smith, with whom Mrs. Wilson had some favorable rapport, do not lend any support to Mrs. Wilson's recalled memories. And Mr. Wilson, when asked in 1995 by the court:

> Q. Was there ... ever a time when your wife indicated to you that anyone associated with Court, whether it be a bailiff or a court clerk or even myself, had any communication with her about the case that she considered to be inappropriate?

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[40] Id. at 26.

[41] Id. at 27.

[42] Id. at 42.

[43] See, for example, testimony of Juror hood. Clerk's Docket No. 7164, Ex. B at 197.

A. No.[44]

But the colloquy did not end there. The court pressed Mr. Wilson for whether he had any information about things going on outside the jury room, to which he responded:

> A. Okay. Well, when she'd come out of the deliberation room, there would be a guard or somebody out there, and they--she never brought up. It was usually they were trying to calm her down or comfort her in some way with words or sometimes hugs or whatever it took to get her calmed down.
>
> But the guards did on some occasions you know, console her, like I said, with hugs and words and other occasions redirected her and turned her right back into deliberation.
>
> Q. Do you have any reason to believe, based on what she told you, that there were-during those occasions when she was outside the jury room, that there were any communications with her about the deliberations from court personnel?
>
> A. I don't think it's about the subject of the deliberations, maybe the style or the vein that it was taking, but not-I don't think it had to do with the subject matter they were discussing.[45]

Plainly the foregoing is at odds with what the court is now told about the interchange between CSOs and Mrs. Wilson. Surely Mr. Wilson would have told the court in 1995 had he felt that his wife had been threatened or intimidated in the closing weeks of jury deliberation.

Mrs. Wilson's description of a personal encounter with CSO Warrick is substantially undercut by the absence of any clues of such misconduct in the course of the interviews of

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[44] Id., Ex. B at 239.

[45] Hearing Transcript (06/14/95 at 240-41).

other jurors in 1995. Mr. Wilson's 1995 testimony gave no hint of the encounter which Mrs. Wilson now recalls. Moreover, and this is based in part upon the court's own personal observations, other jurors appear to have been concerned for Mrs. Wilson's emotional well-being during deliberations, and Juror Hood in particular is known to have attended Mrs. Wilson in the anteroom to the jury deliberation room where both were once seen by a deputy court clerk and subsequently by the court itself. Mrs. Hood attended Mrs. Wilson on the two occasions of which the court has knowledge, during which Mrs. Wilson left jury deliberations in distress. Mrs. Hood has testified unequivocally that she has no knowledge of any coercion taking place outside the jury room.[46]

Mrs. Wilson kept a journal during the deliberations. None of the incidents which she now recalls and attributes to CSO Warrick are mentioned in the contemporaneous journal.[47] The marshal's investigation turned up no support for what Mrs. Wilson now recalls.

The court finds that Mrs. Wilson more probably than not did not learn of the bullet incident involving CSO Warrick and Juror Graham during the time the jury was deliberating. Rather, the court finds that she learned of this incident later, more probably than not as a result of publicity following the court's denial of Exxon's first motion for a new trial which followed the 1995 juror interviews. The court finds that Mrs. Wilson has unintentionally and mistakenly incorporated the incident between CSO Warrick and Juror Graham into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen.[48]

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[46] Clerk's Docket No. 7164, Ex. B at 177-78.

[47] Wilson Transcript at 43-44.

[48] Id. at 37-38.

The Phase III jury deliberations were plainly an extraordinarily stressful experience for Mrs. Wilson. It appears that Mrs. Wilson is still struggling with her role in those deliberations and self-doubt about her joinder in the verdict. She should not have these concerns. All indications to the court are that Mrs. Wilson did everything (and perhaps a whole lot more) than could reasonably have been expected of her before agreeing to join in the verdict ultimately returned. The comments should not be taken to imply that Mrs. Wilson has testified untruthfully. The court is convinced that Mrs. Wilson believes what she has said. However, her present memories do not reflect what really happened. The court finds that Mrs. Wilson did not have any inappropriate, threatening, or coercive encounter with CSO Warrick during jury deliberations.

Exxon points to other alleged improprieties gleaned from Mrs. Wilson's testimony such as the incident attributed to Juror Dean. Mrs. Wilson says that after she capitulated and as the jury formed a line in the corridor outside the courtroom, ready to enter for the return of their verdict,[49] Juror Dean threatened her.[50]

Here also, and when Mrs. Wilson's recent testimony is examined in the light of the 1995 testimony of other jurors, the court finds that the allegation of a threat by Juror Dean is not credible. A quiet corridor with all of the other jurors in close proximity is not a likely place for a threat to have been made to Mrs. Wilson. In her recent testimony, Mrs. Wilson speaks of receiving death threats after she completed her jury service and returned to work.[51] She describes threatening notes being left on her automobile.[52] Mrs. Wilson says that

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[49] Id. at 20.

[50] Id. at 13.

[51] Mrs. Wilson testified that from the end of trial (September 16, 1994) until as attempted suicide in October of 1995, she received 30 to 50 death threats. Id., at 39.

[52] Id. at 40.

these incidents were informally reported to a police officer, but none of the notes were ever saved or brought to anyone's attention here.[53] It is likely that there are serious difficulties in Mrs. Wilson's life at the present time,[54] but Mrs. Wilson's allegation of a threat by Juror Dean is not credible.

One can infer from Mrs. Wilson's testimony that she was the last "holdout" as regards joining in the verdict which was rendered. The court does not doubt that she came under intense pressure from the other jurors to join them in a verdict. However, had Mrs. Wilson entertained serious reservations, or were the verdict against her will or otherwise coerced, she was afforded a perfect opportunity to recant if she had been of a mind to do so, for whatever reason, when the verdict was taken and the jury was polled. She did not do so. The court infers from her testimony that Mrs. Wilson now regrets having concurred in the verdict, and is expressing feelings of guilt for having given in. In light of the fact that deliberations went on for seven days after the court became aware of Mrs. Wilson having some distress, there is absolutely no reason for her or any juror to feel that they gave the deliberations anything short of their very best efforts.

Turning to the technical side of the contention that Mrs. Wilson was threatened by Juror Dean, this exchange is plainly one between two jurors at a point in time where a verdict has not yet been formally rendered, by which one juror seeks to impeach the verdict by conduct attributed to another juror. "Once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980). The Exxon Valdez jury delivered its verdict in open court, was polled, and all jurors concurred in the verdict after the alleged threat. That verdict may not now be upset on the basis of a threat made by one juror to another.

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[53] Id.

[54] See Juror Testimony at Clerk's Docket No. 7164, Ex. B at 145.

The court concludes that Mrs. Wilson was not the subject of coercive conduct or other impermissible communications from CSO Warrick or another juror during jury deliberations.

Other Claims

Exxon makes several subsidiary claims of improprieties by CSO Warrick. He is said to have attended a picnic on the Fourth of July which was planned and attended by jurors. He is said to have had several other social encounters with Juror Dean.

As to the other incidents, the court finds that they probably happened. The court further finds that these incidents, and in particular those involving Juror Dean, were not coercive in nature or effect. Under such circumstances, Exxon must demonstrate actual prejudice and that the outcome was affected. See authorities at pages 8-9, supra. CSO Warrick's conduct evinces incredibly poor judgment, but Exxon has made no showing that these occurrences had or were likely to impact jury deliberations.[55] The contacts were not presumptively prejudicial. Exxon has not shown any actual prejudice as a result of the conduct, and has not shown that the outcome would have been different had-these social encounters between CSO Warrick and jurors not occurred.

Conclusion

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[55] The court is not unmindful that the investigation of CSO Warrick by the Marshals Service developed information suggesting that at the Fourth of July gathering of jurors, CSO Warrick complimented the jurors on the job they were doing. As of that date, the parties were is the midst of their presentation of the compensatory damages phase of the trial--an aspect of the case not focused upon by the motion for new trial. It is true that the jury had already determined the defendants' liability for positive damages; however, they were a long way from their unchallenged verdict as to compensatory damages and even further from their consideration -of the amount of punitive damages. The likelihood that a comment that the jury was "doing a good job" made in July would have any lasting impact upon the jury by the time it commenced consideration of the punitive damages phase of the case in September is nil.

The court has concluded that Mrs. Wilson's recall of events occurring three and a half years ago are untrustworthy. Considering all of the evidence, the court concludes that neither Juror Graham nor Juror Wilson were coerced by CSO Warrick. CSO Warrick's socializing with jurors was reprehensible, but not coercive. That conduct did not prejudice Exxon and did not affect the verdict. Exxon's motion for a new trial, joined in by defendant Hazelwood, is denied.

DATED at Anchorage, Alaska, this __ day of July, 1998.

H. Russel Holland, Judge
District of Alaska

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
	)	No. A89-0095-CV (HRH)
This Order Relates to All Cases	)	

AMENDED ORDER NO. 339
Exxon's Second Motion for New Trial
(Coercion of Juror)

The Exxon defendants[1] (hereinafter Exxon) have moved pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure, for a new trial as to Phase I (liability for punitive damages) and Phase III (amount of punitive damages).[2] In keeping with this court's standing orders for procedural matters in this case, Exxon sought and obtained leave for the filing of this motion.[3] Because this case was already on appeal to the Ninth Circuit Court of Appeals, the motion sought approval of an application to that court for a remand in order that the motion for new trial might be considered. The court indicated its willingness to receive a remand, and, on January 16,

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[1] Exxon Corporation (D-1) and Exxon Shipping Company (D-2).

[2] Clerk's Docket No. 7124. This motion was filed with the clerk of court on September 23, 1997, covered by a motion to lift stay on motion practice. Clerk's Docket No. 7116. The motion to lift stay was subsequently granted. Clerk's Docket No. 7123. Joseph Hazelwood (D-07) has joined in the motion. Clerk's Docket Nos. 7117, 7160.

[3] Order No. 335 (Oct. 9: 1997), Clerk's Docket No. 7123.

1998, the court received and filed the order of the court of appeals granting the parties' joint motion for a limited remand.[4]

Also included within Exxon's motion was a request for limited discovery. That request was granted.[5] In earlier proceedings (which are discussed below) and as a part of Exxon's first motion for a new trial, the court conducted a hearing at which the court, with input from counsel, interviewed ten of the eleven jurors who heard Phase III of the trial of this case, the husband of the eleventh juror, a court security officer, and a deputy clerk of court.[6] Because of concerns for the health of Rita Wilson, the eleventh juror, she was not interviewed.[7] (Mrs. Wilson had experienced a blood pressure problem during closing arguments and had become very emotional during Phase III deliberations.) As a consequence of information obtained by Exxon through discovery allowed in aid of this second motion for new trial, Exxon moved for leave to depose Mrs. Wilson.[8] The court granted leave to depose her.[9]

To complete the procedural development of this motion, and as approved by the court, supplemental memoranda summing up the positions of the parties with respect to Exxon's second motion for new trial have been filed.[10]

Background

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[4] Clerk's Docket No. 7131.

[5] Order No. 336 (Jan 23, 1998), Clerk's Docket No. 7132.

[6] Transcript of Sealed Hearing (June 13, 1995). Ex. 13 attached to Clerk's Docket No. 7164.

[7] Order No. 296 (Aug. 17, 1995), Clerk's Docket No. 6435.

[8] Clerk's Docket No. 7144.

[9] Order No. 337 at 2 (Mar. 5, 1998), Clerk's Docket No. 7146.

[10] Exxon's supplemental memorandum is at Clerk's Docket No. 7163, plaintiffs' response is at Clerk's Docket No. 7164, and Exxon's reply is at Clerk's Docket No. 7167.

Trial of Phase I of the Exxon Valdez litigation commenced on may 2, 1994. Verdicts were returned by the trial jury as to Phase I (liability for punitive damages) on June 13, 1994,[11] as to Phase II (compensatory damages) on August 11, 1994,[12] and as to Phase III (the amount of punitive damages) on September 16, 1994.[13] As to Phase II, the trial jury deliberated for 23 days; as to Phase III, the trial jury deliberated for 14 days. Because of the manner in which the trial was conducted and the form of the jury verdicts rendered, there was some considerable delay in the formulation of a final judgment which was not entered until September 24, 1996.[14]

On September 6, 1995, Exxon filed its first motion for a new trial pursuant to Rule 60(b)(2) as to Phases I and III (liability for and the amount of punitive damages).[15] Pertinent to what is now before the court, this initial motion for new trial raised issues of improper contact with jurors by Court Security Officer (CSO) Warrick.[16] After reviewing the circumstances concerning a communication between Juror Graham and CSO Warrick, and using words which have now come back to haunt this judge, it was said: "The court is not convinced that the incident [between Juror Graham and the CSO] ever occurred."[17] Hedging a bit, the court went on to conclude that: "If the incident took place as Juror Graham testified, then the CSO exercised incredibly poor judgment,

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[11] Clerk's Docket No. 5314.

[12] Clerk's Docket No. 5714.

[13] Clerk's Docket No. 5889.

[14] Clerk's Docket No. 6199.

[15] Clerk's Docket No. 6448.

[16] Order No. 308 (Feb. 20, 1696) at 9-23. Clerk's Docket No. 6638.

[17] Id. at 21-22.

but such foolishness would not warrant a new trial."[18] Exxon's motion for a new trial was denied.[19]

It is against, the foregoing background that the court received and considered Exxon's second motion for new trial. In its initial submission, Exxon made a prima facie showing that the incident between Juror Graham and CSO Warrick had indeed occurred. The United States Marshals Service had independently investigated the accusation that CSO Warrick had improperly contacted a juror. Both Warrick and Graham took a polygraph test. Ultimately Warrick confessed that the incident had taken place much as Juror Graham had described it.[20] CSO Warrick was terminated and subsequently died of natural causes.

In light of this development, and because Mrs. Wilson was the focus of the CSO's conversation with Juror Graham, the court became persuaded that she was the juror most likely to have been affected by the communication with Juror Graham if it had been communicated to her.[21] Accordingly, and as set out above, the court authorized a deposition of Mrs. Wilson. By agreement of the parties, Mrs. Wilson was examined by a single attorney for each side. The deposition was conducted in the presence of the court, but in the conference room of counsel for plaintiffs. Mrs. Wilson was accompanied by her husband and her counsellor. The transcript of Mrs. Wilson's deposition has been filed with the court under seal.[22]

Timeliness of Motion

Exxon's motion for a new trial is made pursuant to Rule

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[18] Id. at 23 (footnote omitted).

[19] Id. at 25.

[20] The details of this incident were set out and discussed by the court in order No. 308 (Feb. 20, 1996) at 21-23.

[21] Order No. 337 at 2 (Mar. 5, 1998), Clerk's Docket No. 7146.

[22] Clerk's Docket No. 7155.

60(b)(2), Federal Rules of Civil Procedure. The rule provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . . The motion The motion shall be made within a reasonable time, and for reasons (1) , (2) , and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Plaintiffs raise the issue of the timeliness of Exxon's motion for new trial and in so doing concede, as the plaintiffs must, that the request for leave to file the instant motion was filed on the 364th day following the entry of judgment. The motion itself was timely presented. The somewhat obscure but potentially significant point as regards timeliness which the plaintiffs make is that the newly discovered evidence known to Exxon in September of 199, upon which the instant motion is founded, was simply that the incident involving juror Graham and the CSO occurred much as the juror contended. The details of the marshal's investigation and Mrs. Wilson's testimony all came much later and were not known by Exxon until more than a year after judgment.

Rule 60(b)(2) plainly says that one must discover new evidence and act upon it by filing an appropriate motion within a year from the entry of judgment. If a party discovers new evidence which might justify seeking a new trial more than a year after the entry of judgment, the discovery is too late. Here we have a situation which the rule and, so far as the court is aware, the text writers do not address: May a party who has timely moved for a new trial on the basis of newly discovered evidence offer further support for that motion by way of additional new evidence which was not dis-

covered until after one year subsequent to the entry of judgment?

Plaintiffs rely upon Nevitt v. United States, 886 F.2d 1187 (9th Cir. 1989), for the proposition that the one-year period established by Rule 60(b) is jurisdictional and not subject to tolling. In Nevitt, and presumably here, the pendency of an appeal does not toll the one-year period. Nevitt, 886 F.2d at 1188. Nevitt, however, simply does not reach the question now before this court.

The court concludes that it has jurisdiction to entertain and decide on the merits Exxon's second motion for new trial. That motion was filed within one year from the entry of judgment, and the court has reacquired jurisdiction otherwise lost to the Ninth Circuit Court of Appeals by order of the latter court. Exxon made a prima facie showing that Order No. 337 was based in part upon the perjured testimony of a CSO. The court was requested to permit -- and, in the exercise of its discretion, did permit -- Exxon to undertake specific, limited discovery in furtherance of the second motion for new trial. That limited discovery led to a further motion to depose Rita Wilson which the court granted. The court concludes that Exxon is entitled to employ all of the newly discovered evidence, both that coming to their attention prior to filing their second motion for new trial, as well as that developed with court approval is subsequent proceedings on the motion for new trial.

The second motion for new trial was timely filed, and neither Rule 60(b)(2) nor any other authority called to the court's attention would foreclose the court from permitting Exxon a reasonable opportunity to further develop newly discovered evidence of substance which came to Exxon's attention prior to the one-year limitation period.

Rule 60(b)(2) Analysis

In deciding a motion based upon Rule 60(b)(2) filed in the context of potential jury coercion, the court must undertake a two-part analysis. First, the court determines whether

an evidentiary hearing is required. United States v. Madrid, 842 F.2d 1090, 1094 (9th Cir. 1988). This aspect of the case is not in dispute. There being a reasonable possibility of prejudice to the defendants, the court permitted the parties to inquire extensively of the trial jury in connection with the first motion for new trial and, as discussed above, granted Exxon's request for the development of new evidence of potential misconduct involving trial jurors. Neither plaintiffs nor Exxon has requested any further hearings. The hearing portion of the two-part analysis has been concluded.

The parties disagree as to the second step of the Rule 60(b)(2) analysis. Defendant contends on the basis of Remmer v. United States, 347 U.S. 227, 229-30 (1954), that contacts between court officers and jurors pertaining to the case are "presumptively prejudicial" and invalidate the verdict if harmful. Plaintiffs, on the other hand, assert that Exxon must show actual prejudice as a result of the conduct, Madrid 842 F.2d at 1093. and "that the outcome would have been different." Hard v. Burlington Northern R.R., 870 F.2d 1454, 1461 (9th Cir. 1989).

The resolution of the foregoing disagreement depends upon whether or not the CSO's conduct amounted to coercion. A new trial is required if any communication between a court officer and juror is of a coercive nature. United States v. U.S. Gypsum Co., 438 U.S. 422, 460-62 (1978); Jenkins v. United States, 380 U.S. 445, 446 (1965). If coercive, prejudice is presumed, and defendants' motion must be granted unless the harmlessness of the conduct is shown. Hobson v. Wilson, 737 F.2d 1, 47 (D.C. Cir. 1984), citing Mattox v. United States, 146 U.S. 140 (1892).

Existence of Coercion

To determine whether the CSO's actions were coercive, the court must examine the communications "in [their] context and under all the circumstances . . . ." Jiminez v. Myers, 40 F.3d 976, 979-80 (9th Cir. 1993) (quoting Marsh v. CURD, 536 F.2d 1287, 1290 (9th Cir. 1976) (quoting Jen-

kins, 380 U.S. at 446)). The court will consider the following factors in determining whether coercion is present: (1) with whom did the juror have contact; (2) the type of event alleged to be coercive; and (3) the length of time between the alleged coercive events and the verdict.

Discussion

The court now turns to its review of the newly developed evidence and application of tire foregoing principles. The foregoing suggests the following issues to be decided: (1) are jurors' statements concerning contact with a CSO believable; (2) if so, was the CSO's conduct coercive; (3) if coercive, have plaintiffs demonstrated the harmlessness of the contact between jurors and the CSO; and (4) if not coercive, has Exxon shown actual prejudice and that the outcome would be different?

The primary focus of Exxon's second motion for new trial is on the conduct of CSO Donald Warrick. Exxon accuses CSO Warrick of eight separate acts of misconduct.[23] CSO Warrick is alleged to have attended a jurors' picnic on July 4, 1994. CSO Warrick is alleged to have had two separate contacts with Juror Dean. CSO Warrick is accused of the bullet incident with Juror Graham which was the subject of the court's Order No. 308. CSO Warrick is accused of lying to the court -- a matter which does not appear to involve any juror directly. Finally, and most importantly, Exxon accuses CSO Warrick of three instances of improper contacts with Juror Wilson.

Juror Graham

The exchange between CSO Warrick and Juror Graham is described at some length in an earlier order.[24] Briefly summarized, it is now undisputed that a brief conversation involving a bullet and/or the CSO's weapon took place in a

[23] Supplemental Memorandum in Support of Motion at 3-4, Clerk's Docket No. 7163.

[24] Order No. 308 (Feb. 20, 1996) at 21, Clerk's Docket No. 6638

public area of the courthouse with Juror Graham. The incident took place on or about September 7, 1994,[25] the midpoint of the 14 days of deliberations as to Phase III of the trial. The CSO lied to the parties and the court when he denied that the conversation had ever taken place. The marshal's investigation of this event shows that Graham treated this encounter as a bad joke. Graham was not sure whether he told anyone of the incident with the CSO, but says that if he told anyone it was jury foreman Murray who did not recall being informed of the encounter between Graham and the CSO.

The proof is now conclusive that the incident with CSO Warrick and Juror Graham took place. It was of a potentially coercive nature; however, the potential coercion was not directed at juror Graham, and the court finds that the incident did not adversely affect Graham's deliberations or coerce any other juror. The court specifically finds that Juror Graham was not coerced by the incident and that, with the possible exception of the jury foreman, the other jurors did not learn of the incident during the time they deliberated.[26] The lack of knowledge of the CSO/Graham incident on the part of other jurors is a matter of considerable import to which the court will return when discussing Juror Rita Wilson. Exxon has not shown prejudice or that the incident between CSO Warrick and Juror Graham affected the verdict. The court finds that the CSO's contact with Juror Graham was reprehensible but harmless.

For the reasons and upon the authorities discussed by the court in its order deciding the defendants' initial motion for new trial,[27] as modified and amplified by the foregoing, the

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[25] The incident occurred on a morning as juror Graham entered the courthouse, so it must have taken place after the events during the day of September 2, 1994, a Friday preceding the Memorial Day weekend, and therefore on September 6, 7, or 8, 1994. Transcript of juror interviews, Ex. B at 141, Clerk's Docket No. 7164.

[26] See testimony of ten jurors, Clerk's Docket No. 7164 (Ex. B).

[27] Order No. 308 (Feb. 20, 1396) , Clerk's Docket No. 6638.

court finds and concludes that the incident involving Juror Graham and the CSO did not coerce a verdict.

Juror Wilson

The defendants' allegations of improprieties by a CSO in contact with Juror Wilson are by far the most troublesome and serious allegations made in support of the second motion for new trial. The plaintiffs contend that Juror Wilson's testimony is "simply not credible".[28] Exxon defends Juror Wilson's credibility, pointing out that, "[t]he liar and perjurer in this case is known."[29] Because the court was previously deceived by CSO Warrick regarding his contacts with one juror, the court has read and re-read the statements of all of the jurors taken in June of 1995 and has taken a great deal of time to consider what all have said and argued about a possible direct contact between CSO Warrick and Juror Wilson.

There have been a number of separate occasions on which the court has had an opportunity to observe and/or have some interaction with Mrs. Wilson. The first was in the course of jury selection. Mrs. Wilson's juror questionnaire gave no hint that a long trial and lengthy deliberations might be an unreasonable burden for her. The juror voir dire of Mrs. Wilson was essentially unremarkable. Second, the court had the opportunity of observing Mrs. Wilson during the course of trial. The court recalls that Mrs. Wilson was attentive. During Phase I, for reasons which are now lost to the court's memory, the court developed a concern for Mrs. Wilson's health such that when a note was received indicating that a juror was having a medical problem, the court assumed that it was Mrs. Wilson. In fact, it turned out to be a different juror who was then excused for medical reasons. Approximately one month prior to the close of testimony in Phase III, Mrs. Wilson expressed concern over her employ-

[28] Plaintiffs' Response to Exxon's Motion for New Trial at 11, Clerks Docket No. 7164.

[29] An obvious reference to CSO Warrick., Exxon's Reply Memorandum at 3, Clerk's Docket No. 7167.

ment situation. The court personally spoke to Mrs. Wilson's supervisor and ascertained that the supervisor was aware of Mrs. Wilson's situation and that the necessary administrative paperwork would be processed in order that Mrs. Wilson's job would not be adversely affected by her jury service. The situation appeared to present no difficulty whatever.

The circumstances of the court's third (and to this point, most direct) contact with Mrs. Wilson occurred on Thursday, September 8, 1994. These circumstances are set out in the court's order of February 20, 1996.[30] Briefly summarized, the situation was this. On September 2, 1994, a Friday prior to the Labor Day weekend, Mrs. Wilson was observed weeping in the anteroom directly outside the jury deliberation room. The court sent the jury home at this point and, on Tuesday morning, September 6, 1994, following the long weekend, gave a mild cautionary instruction to the jury suggesting that they treat one another courteously. The jury responded with a note that they were at an impasse, and the court then (the next morning) gave another, low-key instruction which in substance ignored the declaration of impasse, and suggested that the jurors take as much time as they needed to reach a verdict.[31]

On the next day, Wednesday, September 7, 1994, the jury passed a note to the court advising that a juror was emotionally unable to deliberate further. On the morning of September 8, the court ascertained that the juror in question was Mrs. Wilson, and, in the presence of counsel and *on* the record, inquired of Mrs. Wilson as to her situation. Mrs. *Wilson* expressed her desire to continue deliberations, concluding: "I feel really strong and I have to be there, I feel like that I make a difference."[32] Mrs. Wilson returned to the jury de-

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[30] Order No. 308 (Feb.'20, 1996) at 10-17, Clerk's Docket No. 5638.

[31] At page 11 of Order No. 308 (Feb. 20, 1996), the court rejected Exxon's *contention that* this instruction was an "Allen charge."

[32] Trial Transcript, Vol. 46 at 7698, Clerk's Docket No. 5807.

liberation room. Shortly after the foregoing exchange, Mrs. Wilson sent a note requesting to speak to the court again. The court met Mrs. Wilson at the jury room door and advised her that in light of what she had just said on the record, the court could do nothing further at that time beyond suggesting that the jurors follow the court's instructions.

There were five full days of uninterrupted jury deliberations between the last of the foregoing events and the day (September 16, 1994) that the Phase III verdict was returned. The jury polled and all eleven jurors, including Mrs. Wilson, answered in the affirmative with respect to the entirety of the special verdict which had been reached.

Finally, and most importantly, the court observed Mrs. Wilson on the occasion of her deposition in connection with the instant motion on March 16, 1998. The deposition was arranged by the court personally through Mrs. Wilson's spouse. No subpoena was issued inasmuch as Mrs. Wilson indicated a willingness to appear voluntarily. At Mrs. Wilson's request through her spouse, arrangements were made to conduct the deposition away from the courthouse and with both Mr. Wilson and Mrs. Wilson's counsellor in attendance.

The court, plaintiffs' counsel O'Neill, and defense counsel Serdahely, as well as the court reporter, arrived at the agreed upon location for the deposition ahead of Juror Wilson. Mrs. Wilson entered with her husband and her counsellor, Karen Zenzig. Counsel sat on one side of a large conference table, and Juror Wilson, et al. occupied the other side of the table. Juror Wilson appeared apprehensive as she entered the room. The court sensed no hostility on the part of Juror Wilson or those who were with her.

Juror Wilson was sworn as a witness and Mr. Serdahely examined her on behalf of the defendants. Mr. Serdahely's demeanor was gentle. He spoke softly and calmly. He was not confrontational in any way. The questioning had not progressed more than a minute or two when the court observed that Juror Wilson's hands were trembling. By a few

minutes into her examination, Juror Wilson's arms were trembling, even though one hand was being held by her husband and the other by her counsellor. By several more minutes into the examination, Juror Wilson was weeping, and within perhaps ten minutes of the start of the deposition, her entire body was trembling. Mrs. Wilson exhibited great emotional distress.

In similar stressful situations, most witnesses observed by the court have soon experienced considerable difficulty in speaking and they often find it impossible to continue answering questions until they have composed themselves. Such was not the case with Juror Wilson. She appeared oblivious to the violent trembling of her limbs and copious weeping.[33] Throughout the direct and cross examination of Mrs. Wilson by plaintiffs' counsel O'Neill (which was more rapid and just a bit more forceful than that by defense counsel) Mrs. Wilson's demeanor remained the same.

Throughout the deposition, Mrs. Wilson gave the impression that she was well oriented as to time, place, and persons involved in the matters which were the subject of inquiry. Yet what the court observed tells a very different story. There was no objective reason for Mrs. Wilson to be fearful or emotional. The deposition was conducted at a place and under circumstances which she approved. While a lay person may often feel "butterflies in the stomach" at the prospect of testifying in a court proceeding, most soon, become absorbed in the substance of the inquiry and appear quite at ease. Unlike many witnesses who testify before the court, Mrs. Wilson had absolutely nothing at stake. She did not stand to gain or lose anything as a result of her testimony. As a consequence, the severe trembling and copious weeping was a wholly inappropriate response to the circumstances. Given the situation and the subject matter of the deposition,

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[33] On several occasions, Mrs. Wilson stated that she felt "embarrassed". The comments appeared not to have to do with her emotional state, but rather with the subject matter under discussion.

the court could readily appreciate a juror expressing anger or annoyance, but the gross physiological response of Mrs. Wilson casts substantial doubt upon the reliability of what she has said.

The court turns now to what Mrs. Wilson told counsel and the court at the deposition held March 16, 1998. It developed at the outset that Mrs. Wilson knew who CSO Warrick was.[34] It was a matter of concern to the court and counsel whether Mrs. Wilson knew of the so-called "bullet incident" involving the CSO and Juror Graham. In response to the question, as clarified by plaintiffs' counsel, "were you ever made aware or were you aware [of that incident] at the time?", Mrs. Wilson responded, "Oh, yes, very much so."[35] What followed can only be described as bizarre *and shocking*. Exxon's attorney inquired as to what Mrs. Wilson recalled of the incident. The court cautioned that the participants not get into Mrs. Wilson's thought processes, and she responded with a question, "what they told me?"; whereupon the witness responded, "That I was wanted dead." Patently shocked, Mr. O'Neill interjected: "Who -- I'm sorry." Mrs. Wilson went on to say in substance that the CSO and all of the rest of the jurors, except Margaret and Jewel wanted her "killed".[36]

With only a few digressions, the bulk of the remainder of

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[34] Wilson Transcript at 3. The transcript of the deposition of Mrs. Wilson is filed under seal at Clerk's Docket No. 7155.

[35] Id. at 5-6. In response to cross-examination questions on this same subject, Mrs. Wilson was asked:

> Q. So, Doug [Graham] and the bailiff [CSO Warrick] were showing you guns?
>
> A. No, Doug didn't show me a gun, but I knew that Doug had been shown a gun. He told me he had, and then the bailiff had shown me a gun.

[36] Id. at 6.

Mrs. Wilson developed the foregoing theme.[37] Mrs. Wilson testified about several personal encounters with CSO Warrick on or about September 8, 1994, including an incident strikingly similar to the Warrick/Graham incident.[38] The court finds Mrs. Wilson's present memories of contacts with CSO Warrick and other jurors are not credible.

In explaining the foregoing, the court must first address its own embarrassments over learning that the "bullet incident" between the CSO and Juror Graham in fact occurred. In deciding Exxon's first motion for a new trial, the court in substance discounted the testimony of juror Graham, only to learn that his rendition of the encounter with CSO Warrick was accurate and that CSO Warrick had lied to the court. It would be very easy at this juncture for the court to leap to the conclusion that, because the "bullet incident" took place with juror Graham, the similar incident now described by Mrs. Wilson involving CSO Warrick and his weapon must also have occurred. That would be unfair to the plaintiffs and to the ten other jurors who labored for fourteen days to reach a verdict on Phase III.

In the March deposition, Mrs. Wilson accuses CSO Warrick of handling his weapon and a bullet in her presence just outside the jury deliberation room in the course of an intimidating conversation which she describes. Mrs. Wilson testified, on both direct and cross-examination, that the CSO took a bullet and placed it in his gun in her presence.[39] What surrounds this testimony is both confusing and incredible. Mrs.

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[37] In the examination of Mrs. Wilson, a lot was said without objection about interaction between Mrs. Wilson and other jurors. The court did not intervene due to the extremely stressful, although non-confrontational, nature of the discussion between counsel and Mrs. Wilson. Moreover, the court had been expressly told by Mr. Wilson in the course of arranging the deposition that he felt his wife needed to say some things to us for her own well-being.

[38] Wilson Transcript at 27-28.

[39] Id. at 8, 27.

Wilson appears to state under oath that she knew Graham had been shown a gun, and that Juror Graham told her (in the presence of the rest of the jury) that he could get a weapon from the bailiff.[40] Such is absolutely inconsistent with Graham's testimony when he was interviewed by the court in 1995. The marshal's investigation, as discussed above, has convinced the court that Mr. Graham has been truthful and that he has testified accurately when he says that no one (with the possible exception of the jury foreman) was told of the bullet incident with CSO Warrick during deliberations. Later in her deposition, Mrs. Wilson says Juror Graham never told her about the bailiff showing him a bullet.[41] When asked whether there were other jurors of whom we might inquire on this subject, she responded "no", that the only persons who knew about the matter were "Karen and Jerry" (Mrs. Wilson's counsellor and spouse, respectively).[42]

During jury deliberations, Mrs. Wilson told other jurors the substance of what went on when she was outside the jury deliberation room.[43] According to the other jurors as interviewed in 1995, she never mentioned being threatened by a CSO. Jurors Johnson and Smith, with whom Mrs. Wilson had some favorable rapport, do not lend any support to Mrs. Wilson's recalled memories. And Mr. Wilson, when asked in 1995 by the court:

> Q. Was there . . . ever a time when your wife indicated to you that anyone associated with Court, whether it be a bailiff or a court clerk or even myself, had any communication with her about the case that she considered to be inappropriate?

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[40] Id. at 26.

[41] Id. at 27.

[42] Id. at 42.

[43] See, for example, testimony of Juror Hood. Clerk's Docket No. 7164, Ex. B at 197.

A. No.[44]

But the colloquy did not end there. The court pressed Mr. Wilson for whether he had any information about things going on outside the jury room, to which he responded:

> A. Okay. Well, when she'd come out of the deliberation room, there would be a guard or somebody out there, and they -- she never brought up. It was usually they were trying to calm her down or comfort her in some way with words or sometimes hugs or whatever it took to get her calmed down.
>
> But the guards did on some occasions you know, console her, like I said, with hugs and words and other occasions redirected her and turned her right back into deliberation.
>
> Q. Do you have any reason to believe, based on what she told you, that there were -- during those occasions when she was outside the jury room, that there were any communications with her about the deliberations from court personnel?
>
> A. I don't think it's about the subject of the deliberations, maybe the style or the vein that it was taking, but not – I don't think it had to do with the subject matter they were discussing.[45]

Plainly the foregoing is at odds with what the court is now told about the interchange between CSOs and Mrs. Wilson. Surely Mr. Wilson would have told the court in 1995 had he felt that his wife had been threatened or intimidated in the closing weeks of jury deliberation.

Mrs. Wilson's description of a personal encounter with CSO Warrick is substantially undercut by the absence of any clues of such misconduct in the course of the interviews of

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[44] Id., Ex. B at 239.

[45] Hearing transcript (06/14/95) at 240-41.

other jurors in 1995. Mr. Wilson's 1995 testimony gave no hint of the encounter which Mrs. Wilson now recalls. Moreover, and this is based in part on the court's own personal observations, other jurors appear to have been concerned for Mrs. Wilson's emotional well-being during deliberations, and Juror Hood in particular is known to have attended Mrs. Wilson in the anteroom to the jury deliberation room where both were once seen by a deputy court clerk and subsequently by the court itself. Mrs. Hood attended Mrs. Wilson on the two occasions of which the court has knowledge, during which Mrs. Wilson left jury deliberations in distress. Mrs. Hood has testified unequivocally that she has no knowledge of any coercion taking place outside the jury room.[46]

Mrs. Wilson kept a journal during the deliberations. None of the incidents which she now recalls and attributes to CSO Warrick are mentioned in the contemporaneous journal.[47] The marshal's investigation turned up no support for what Mrs. Wilson now recalls.

The court finds that Mrs. Wilson more probably than not did not learn of the bullet incident involving CSO Warrick and Juror Graham during the time the jury was deliberating. Rather, the court finds that she learned of this incident later, more probably than not as a result of publicity following the court's denial of Exxon's first motion for a new trial which followed the 1995 juror interviews. The court finds that Mrs. Wilson has unintentionally and mistakenly incorporated the incident between CSO Warrick and Juror Graham into her own experience where it formed the basis for erroneous, recently regained memories of other incidents which did not happen.[48]

The Phase III jury deliberations were plainly an extraor-

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[46] Clerk's Docket No. 7164, Ex. B at 177-78.

[47] Wilson Transcript at 43-44.

[48] Id. at 37-38.

dinarily stressful experience for Mrs. Wilson. It appears that Mrs. Wilson is still struggling with her role in those deliberations and self-doubt about her joinder *in* the verdict. She should not have these concerns. All indications to the court are that Mrs. Wilson did everything (and perhaps a whole lot more) than could reasonably have been expected of her before agreeing to join in the verdict ultimately returned. The comments should not be taken to imply that Mrs. Wilson has testified untruthfully. The court is convinced that Mrs. Wilson believes what she has said. However, her present memories do not reflect what really happened. The court finds that Mrs. Wilson did not have any inappropriate, threatening, or coercive encounter with CSO Warrick during jury deliberations.

Exxon points to other alleged improprieties gleaned from Mrs. Wilson's testimony such as the incident attributed to Juror Dean. Mrs. Wilson says that after she capitulated and as the jury formed a line in the corridor outside the courtroom, ready to enter for the return of their verdict,[49] juror Dean threatened her.[50]

Here also, and when Mrs. Wilson's recent testimony is examined in the light of the 1995 testimony of other jurors, the court finds that the allegation of a threat by Juror Dean is not credible. A quiet corridor with all of the other jurors in close proximity is not a likely place for a threat to have been made to Mrs. Wilson. In her recent testimony, Mrs. Wilson speaks of receiving death threats after she completed her jury service and returned to work.[51] She describes threatening notes being left on her automobile.[52] Mrs. Wilson says that these incidents were informally reported to a police officer,

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[49] Id. at 20.

[50] Id. at 13.

[51] Mrs. Wilson testified that from the end of trial (September 16, 1994) until an attempted suicide in October of 1994, she received 30 to 50 death threats. Id. at 39.

[52] Id. at 40.

but none of the notes were ever saved or brought to anyone's attention here.[53] It is likely that there are serious difficulties in Mrs. Wilson's life at the present time,[54] but Mrs. Wilson's allegation of a threat by Juror Dean is not credible.

One can infer from Mrs. Wilson's testimony that she was the last "holdout" as regards joining in the verdict which was rendered. The court does not doubt that she came under intense pressure from the other jurors to join them in a verdict. However, had Mrs. Wilson entertained serious reservations, or were the verdict against her will or otherwise coerced, she was afforded a perfect opportunity to recant if she had been of a mind to do so, for whatever reason, when the verdict was taken and the jury was polled. She did not do so. The court infers from her testimony that Mrs. Wilson now regrets having concurred in the verdict, and is expressing feelings of guilt for having given in. In light of the fact that deliberations went on for seven days after the court became aware of Mrs. Wilson having some distress, there is absolutely no reason for her or any juror to feel that they gave the deliberations anything short of their very best efforts.

Turning to the technical side of the contention that Mrs. Wilson was threatened by Juror Dean, this exchange is plainly one between two jurors at a point in time where a verdict has not yet been formally rendered, by which one juror seeks to impeach the verdict by conduct attributed to another juror. "Once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980). The Exxon Valdez jury delivered its verdict in open court, was polled, and all jurors concurred in the verdict after the alleged threat. That verdict may not now be upset on the basis of threat made by one juror to another.

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[53] Id.

[54] See Juror Testimony at Clerk's Docket No. 7164, Ex. B at 145.

The court concludes that Mrs. Wilson was not the subject of coercive conduct or other impermissible communications from CSO Warrick or another juror during jury deliberations.

Other Claims

Exxon makes several subsidiary claims of improprieties by CSO Warrick. He is said to have attended a picnic on the Fourth of July which was planned and attended by jurors. He is said to have had several other social encounters with Juror Dean.

As to the other incidents, the court finds that they probably happened. The court further finds that these incidents, and in particular those involving Juror Dean, were not coercive in nature or effect. Under such circumstances, Exxon must demonstrate actual prejudice and that the outcome was affected. See authorities at pages 8-9, supra. CSO Warrick's conduct evinces incredibly poor judgment, but Exxon has made no showing that these occurrences had or were likely to impact jury deliberations.[55] The contacts were not presumptively prejudicial. Exxon has not shown any actual prejudice as a result of the conduct, and has not shown that the outcome would have been different had-these social encounters between CSO Warrick and jurors not occurred.

Conclusion

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[55] The court is not unmindful that the investigation of CSO Warrick by the Marshals Service developed information suggesting that at the Fourth of July gathering of jurors, CSO Warrick complimented the jurors on the job they were doing. As of that date, the parties were is the midst of their presentation of the compensatory damages phase of the trial -- an aspect of the case not focused upon by the motion for new trial. It is true that the jury had already determined the defendants' liability for positive damages; however, they were a long way from their unchallenged verdict as to compensatory damages and even further from their consideration of the amount of punitive damages. The likelihood that a comment that the jury was "doing a good job" made in July would have any lasting impact upon the jury by the time it commenced consideration of the punitive damages phase of the case in September is nil.

The court has concluded that Mrs. Wilson's recall of events occurring three and a half years ago are untrustworthy. Considering all of the evidence, the court concludes that neither Juror Graham nor Juror Wilson were coerced by CSO Warrick. CSO Warrick's socializing with jurors was reprehensible, but not coercive. That conduct did not prejudice Exxon and did not affect the verdict. Exxon's motion for a new trial, joined in by defendant Hazelwood, is denied.

DATED at Anchorage, Alaska, this __ day of July, 1998.

H. Russel Holland, Judge
District of Alaska